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THE THEORY

OF

OUR NATIONAL EXISTENCE,

AS SHOWN BY

THE ACTION OF THE GOVERNMENT OF THE UNITED STATES SINCE 1861.

JOHN C. HURD, LL.D.,

AUTHOR OF "THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES."

"Etenim si incertam vocem det tuba, quis parabit se ad bellum?"

Epistola Pauli ad Corinthios, prima: cap. xiv. vers. viii.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1881.

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THE THEORY

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OUR NATIONAL EXISTENCE

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JOHN C [illegible]
AUTHOR OF "THE LAW OF [illegible]
THE [illegible]

"Etenim si incertam vocem dat [illegible]
Epistola Pauli [illegible]

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1882. April 7.
Summer Fund.

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DEDICATED IN HOMAGE

TO THE

SOVEREIGN:

WHOEVER HE, SHE, OR THEY,

MAY BE.

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INTRODUCTION.

THE remark is attributed to Paley that it is much harder to make men see a difficulty than to make them understand the explanation of it. Mr. Walter Bagehot, a writer on the English Constitution, in referring to this as a shrewd observation adds: "The key to the difficulties of most discussed and unsettled questions is commonly in their undiscussed parts. They are like the background of a picture, which looks obvious, easy, just what any one might have painted; but which in fact sets the figures in their right position, chastens them, and makes them what they are."

Mr. Bagehot applies this to the difficulty of understanding parliamentary government, especially in England. I think the observation is equally applicable to the discussion of political questions in America. The disputes which have been going on here, ever since the formation of a government independent in respect to the rest of the world, may be due to our failure to bear in mind some circumstances attending all political existence, which must precede, in the order of being, those which we ordinarily consider both fundamental and peculiar to ourselves.

If this is the case with us, I should state the inquiry of which the discussion had been omitted as this: How do we know our political existence to be a fact?

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Dr. Brownson, in his "American Republic" (p. 2), has perhaps expressed the same thought more elaborately when he said: "Among nations, no one has more need of full knowledge of itself than the United States, and no one has hitherto had less. It has hardly had a distinct consciousness of its own national existence, and has lived the unreflective life of the child, with no severe trial, till the recent rebellion, to throw it back on itself and compel it to reflect on its own constitution, its own separate existence, individuality, tendencies, and end."

It appears to me that all our political writers, without exception, have started with the idea that we have no business to have any self-consciousness, or to ask ourselves such a question as the above. They seem to assume that in this country, if in no other, the existence of political facts is not determined by the observing intellect employing the bodily senses, but by knowledge of certain principles of morals. They seem to take for granted that here at least, if nowhere else in the world, not only does that political fact exist which ought to exist, but it exists simply because it ought to exist; or that all they have to do to prove its existence is to show that, if it existed, it would agree with certain principles of morals.

During the sixteenth and seventeenth centuries a form of political instruction was popular which was followed by Sir Thomas More in his "Utopia," by Harrington in his "Oceana," and by other English writers in works less well known. These were avowedly inventions, fictions, describing, as if they were facts, what the writers thought would be facts if facts were what they ought to be. The method of these writers differed from that of Plato, in his dia-

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logue on The Republic, only in this, — that Socrates and his friends were there imagined as discussing things as they wished they might be; while these writers spoke of their fictitious republics as actually existing.

Nearly all descriptions of American political institutions seem to me to have partaken something of the character of these Utopian dreams. The conception of a political philosophy as peculiar to the inhabitants of this country, and providentially designed for them in advance, has not been confined to any particular party or parties, school or schools, or to the residents of any one part of the country more than to those of another part. All American publicists may be seen, more or less plainly, endeavoring to prove the existence of matter of political fact in this country by arguing that such or such a state of things ought to be the existing fact in this country.

The cause of this may be traced further back than the Revolution of 1776. It may be said to have been a natural outgrowth of the circumstances attending the colonization by Englishmen of vacant territory under the political dominion of a sovereign separated from them by an ocean not then so traversable as to-day. They had left England at the time when, as Hume says, plans of imaginary republics, like those of Harrington and More, were daily subjects of debate and conversation; and, under the circumstances in which they found themselves, the reasonings of the individual colonists on the abstract right or propriety of all political arrangements seemed not only to precede the exercise of any visible political authority, but also to be the cause of its recognition. This aspect of political existence was heightened by the effect on personal

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character of the motives inspiring the early colonists of New England, and of those ideas of the relation of government to religion which we associate with the term "Puritan."

This habit of thought on questions of political existence received fresh strength during the eighteenth century from the influence, both in Europe and America, of contemporary French authors, whose theoretical method was essentially the same. It had general ascendancy up to the period of the Revolution of 1776, when it became formulated in the Declaration of Independence. For the words of that instrument assert, substantially, that the thirteen colonies are, that is, are as matter of fact, States independent of Great Britain and the rest of the world, because there is some moral law in existence by which they ought to be so.

I have said that this method of demonstrating political existence has continued to be illustrated by American statesmen and political writers generally, since the Revolution, not being characteristic of one class or section more than another; but for my present purpose, in introducing this essay, it is chiefly noticeable as it appears in the writings of those who have more especially represented opinion in the Northern States.

It appears to me that Kent and Story, with others who have recently succeeded to their position as teachers of public law, to say nothing of many jurists on the bench, have written and spoken of our actual government as if it was their duty, above all things else, to exhibit it as agreeable to some principles assumed by agreement between themselves and their readers to be just, and to

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have thought that no political source of public law could be recognized as an existing fact, unless its accordance with what they personally would regard as goodness of political design could be demonstrated.

These writers, as a class, seem to ignore the fact that, in every country in the world, there must be somebody in existence whose measure of right everybody else must accept as the rule of action before there can be any public law at all; or they conduct their demonstration as if they had shown that there was actually an exception, as to this general condition, in the case of this country.

So far as they have recognized this condition, in respect to this country, it has been by putting a hypothesis in the place of the fact. A fact is known by the observing intellect, aided by the bodily senses, as existing, whether in the judgment of the moral sense it ought to exist or not. The hypothesis in this case is framed to agree with the framer's *a priori* notions of political right.

As a consequence of this method of treating the subject by our professed guides and instructors, an idea appears in all our political controversies, as conducted in representative assemblies, on platforms, or by printed publications, that there is no fact of a political nature, as distinguished from a legal nature, to be ascertained at all; or that we must regard as a fact that which is only an opinion, supported by some moral considerations. And, as political obligation is not distinguished in idea from obligations enforced only by the individual conscience, so, in close connection with this sort of philosophy, is the practical result that the obligation of law is referred to the consent of the individual.

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Americans have, indeed, the reputation of being a mor law-abiding people than the populations of other countrie This may be well deserved, if law is regarded only a a rule corresponding more or less closely with ordinar ideas of justice. Equality of condition and extension c average intellectual education have accustomed a propo tionately larger number to recognize law, in its mor aspect, and to appreciate the general advantage of i being obeyed.

But when the question is of obedience without refe ence to its approval by the moral sense of those to who the rule applies, that is, when law is presented as the ru of action given by some political superior, there is here, in no other country in the world, a feeling that, for u laws exist without reference to the will of any such sup rior, and therefore cannot have binding force for any suc reason.

The consequence is that Americans are almost destitu of the ideas of loyalty and allegiance, and do not concei of rebellion, treason, and civil war as they are appr hended in other countries.

The civil war of 1861 has always been, for this reaso an astonishment and a puzzle to the people of the Nort ern States. They looked upon the action of the peo of the Southern States as presenting only a question morals. They have never been able to see that the cont versy was not about obligations under law, regard simply as a measure of right and wrong, but was o about political obligation in reference to a fact; and t this was an entirely distinct matter.

It is in view of these considerations that I here make

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admission which may seem a singular introduction to these pages,—that is, that the title selected is actually a misnomer.

It is not unlikely that on glancing over a few pages the reader would make the observation for himself. The name "theory" suggests the treatment of a subject, by starting from some principles, assumed or admitted, with the purpose of arriving at some conclusion presented as a deduction from those principles. A theory so framed, by reasoning *a priori*, is, however, precisely the opposite in its nature to that treatment of the subject which I have herein attempted.

It is indeed not a theory, but a fact, which is here the object of the investigation. The term "theory" may, however, be conveniently used to designate a generalization from a number of facts which are the particular instances for the generalization. An induction from such instances, reasoning *a posteriori*, gives a result which, though essentially a fact, may for convenience be called a theory. So it is common to speak of the mutual attraction existing between all material substances, which is commonly called the attraction of gravitation, as a theory; meaning a fact described by generalizing a number of particular instances, such as the fall of an apple to the earth.

It is a theory as identified with a fact, not a theory as distinguished from a fact. It is only in this sense that I call national existence a theory. I have conducted my inquiry on the supposition that the existence of a nation as a political being may be known by generalizing certain actual events, regarded as exhibitions of political force or energy, in the hands of some actually existing human

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beings; which events are to be accepted as fact
nobody can help accepting them as facts.

With such a conception of the proposed invest
will be seen that I have no political philosophy or
of political ethics to set before the reader as axio
accepted in determining the existence or non-
of the facts, even as political facts. Indeed, the ne
the necessity for such doctrines may be regarde
only axiom on which the investigation is founded.

But, in view of what has already been said
prevailing method of considering political subject
country, I anticipate that there will be some
whose first objection to any conclusion here p
will be founded on a rejection of such an axiom.
may be some who do not propose to recognize as
facts any facts which do not conform to certain
doctrines, or who will insist that the acceptanc
political fact must depend on its conformity to cert
existing laws, principles, or ideas assumed to be
in accordance with certain principles of justice.

I shall not dispute with such readers whether a
we call a fact can be settled by any such metho
that is material for me to say about it is that
method is not the method here followed. The onl
ment I propose to give to show the folly of such a
is to produce the results of a method entirely op
as is herein attempted.

If the arrangement of the material forming the b
this essay may be justly criticised for want of
or of logical continuity, I still claim that the purp
proceed by way of induction from a variety of p

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lar instances or examples may give sufficient unity to the whole, in spite of such a lack of formal connection between the several parts.

As further explaining the method, or want of method, of the whole, it may be excusable for me to mention that by far the larger part of the material has been put together since the first and second chapters were in type, in the summer of 1879, when it was proposed to make of the whole only a pamphlet of one hundred and odd pages, from matter which had originally been prepared as a review of the political doctrines announced in one or two official papers, and in some judicial opinions then recently published.

As the object of inquiry presented itself more distinctly as a political fact, its relation to judicial opinion, and to all that class of opinion usually called "authority," developed in a different light. It was apparent that the question of the existence of such a fact could not be a legal one; that is, that it could not be settled by the judicial function, nor by the judgment of any person in official station of any sort. But it was seen, at the same time, that judgments of courts of law, if they are actually carried into execution, are acts of government, which must be accepted as indications of the existence of the political fact that somebody actually exercises power over others.

Viewed in this light, the cases decided by the courts stand in the same relation to the political truth which is the object of search, as do the acts of officers of other departments of a government. All these, as events which have actually taken place, are more material for indicating the location of political force than any juristical opinions can be.

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From this point of view the action of the several d
ments of the Government is equal in political signifi
Each act of government has political value, and the
the number of the particular instances, and the grea
variety, as far as the nature of the inquiry admit
surer should be the basis for the induction of the
ical truth. It will be seen that the later portions
essay are based more distinctly upon this idea.

It is to be borne in mind that the principle follow
this inquiry is to accept *evidence* from any possible s
but to pay no regard to any *opinions* as "authorit
settling the question of fact considered. There
appeal made to great names, as if the opinion of an
or men, however wise or prominent, could decide t
istence of a fact, even of a fact occurring in thei
day, to say nothing of facts which took place before
were born. The statements of persons living or dea
quoted, so far as they are quoted at all, as *testimony* o
question of fact, — a question of history, so far as it i
fact in distinction from present fact. But, being onl
timony, all such statements are freely compared
evidence from every other source.

I think it may be said with truth that the desultor
informal method of inquiry here followed is in accor
with the actual process by which all political existe
apprehended by the bulk of those who are conc
to ascertain it. It may be that it is not the manner o
scholar's private study, nor that of the professor's c
It is not asking for knowledge *ex cathedra*. But
in this manner that the mass of mankind at all
and in all countries become aware of the existenc

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those political facts with which they must agree to live, if they choose to live at all. It is the way in which political authority becomes known to those who move in the ordinary walks of life, whether they are concerned with that authority in the every-day relations of peaceful society, or in the crises of war, foreign or domestic. In any case the knowledge is acquired in the forum, on the market-place, by the fireside or at the tavern, by talking over with other people events which actually take place.

Let us imagine some intelligent traveller finding out some country previously unknown to the rest of the world: whatever other objects he might have in view, his first necessity would be to discover the person or persons whose will was there obeyed by the mass of the population, or who held so much power among them that his own life, security, and liberty of action would depend upon his or their disposition towards himself. It might be that the traveller came with a special purpose to learn the laws by which the action and mutual relations of the inhabitants were regulated. Whatever amount of verbal information he might receive on this point, or however extensive his personal observations of their manners and daily lives, he would not think that he could affirm the existence of any laws regulating their intercourse until he had found out some person or persons whose actual force and will could be traced as a cause securing obedience to such laws.

In making this inquiry the supposed traveller would receive all statements on the subject made in apparent good faith, but he would constantly compare them with any exhibition of actual force or power which might come under his own personal observation. If he should discover cer-

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tain persons, not themselves under the command
other, whose injunctions were actually obeyed by al
persons, or who actually punished all others, at the
discretion, for disobedience to their injunctions, an
when their power had been resisted by force, had a
overcome such resistance by their own superior fo
would conclude that the power to maintain their
law was actually in the hands of such persons, wh
verbal information to the contrary he might ha
ceived.

We may imagine the supposed traveller as a m
newspaper correspondent commissioned to report
employers, for the public at home, the character of
a newly discovered nation. This public at home
read his letters as a report on a matter of fact. Wha
might be his views of the nature of government in ge
of the rights of man as a political animal, or at wha
school or college he might have been educated on
points, this public would not expect to learn anyt
from him on those topics. If, instead of describing
he actually saw, he should send back his views as to
laws and institutions would be beneficial to the cou
he was exploring, or if he should be detected in re
senting the state of things there as if it proved the cor
ness of his own theories of political existence, his emplo
would let him know that he might benefit the publi
that way as well by staying at home, and that it was
for any such purpose that he was commissioned as a t
elling correspondent.

Whatever might have been the ideas on the nature
government in general accepted at home, the supposed t

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eller would not assume that such ideas were equally accepted in the place whose institutions he was to observe. However secure or pleasant he might have regarded his position in a country where such ideas had been accepted by the possessors of power, he would not depend upon such ideas as sufficient to protect his life, person, or property in the strange land he was exploring. Even if he had sought the country in question as a political apostle, filled with zeal to spread by persuasion ideas which he thought best for the government of all countries, he would address himself to finding out what persons were so placed that the influence of such ideas depended on their assent to or their adoption of them, in action.

But however ready he might be to recognize the exercise of power as a fact, the traveller would have some preconceived notions as to the nature of the power whose possessors he wished to identify. These notions would be founded upon his previous knowledge of the necessary conditions of human existence. Whatever he might hear and whatever he might see, he would know that it could only be human will and human intelligence which could direct the power when manifested; that, if it was any power at all, it was the power of human beings. The people among whom he sojourned might point to some sacred grove, whose leaves whispered to the reverent ear; or lead him to some cavern, in whose vapors a priest raved in ecstacy; or show him some block of stone or metal, said to be fallen from the sky, which gave a hollow sound understood by a privileged few; and they might assure him that these sounds, utterances, or whispers directed what was to be done and what was not to be done. But what-

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ever deference the supposed traveller might have b
obliged to yield to similar pretensions in his own coun
he would, in the strange land where he came as an
server, look to those who served the idol, occupied
cavern, or possessed the grove as the real holders of
power to govern.

Or the traveller might have found a people using a v
ten language, who might show him inscriptions on st
brass, wood, parchment, or paper, and tell him that t
monuments were the rules by which alone every perso
the land acted or refrained from acting; that these ins
tions were themselves the power he sought, and the
holders of the power. But if the traveller came from
other country than the United States he would still
about for a human agency, a human intellect interpre
the meaning of the words, and a human will and force
pelling obedience to that meaning, and would ascribe
authority of these written monuments to those who
visibly uncontrolled in executing the injunction or lea
it unexecuted.

Or the traveller might be told that, in that country
among that people, the person whom he sought was n
be found, because the force or power of which, a
supposed, some persons must be possessed, did not
exist. He might be informed that in that country e
thing that was done or left undone was so done or
undone by the will or consent of the several perso
whom, as the actors, it might be so done or left undo

This people might say that, while their written m
ments described or defined the relations of individua
each other, there was no force giving effect to these p

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sions, as law, because the consent of the individuals whose relations were so described or defined was sufficient to maintain the existence of such relations.

The traveller might, at the same time, observe persons who were suffering penalties for transgressing the provisions of these laws, and some who, at the instance of others, had been subjected to coercion in respect to their relations to these others; and he might be told that these penalties were borne and this coercive action took place only by the consent of the individuals affected by them.

Or the traveller, while sojourning among this people, might witness a war in which millions of this people had risen in arms, with the declared intention to nullify or make void, as to themselves, the public relations defined or described by the written monuments, or so-called laws; and he might be told that the sacrifice of life, disaster, and final defeat suffered by these millions, followed by the unrestrained action of the other party to this war, were an illustration or evidence both of the fact that all public relations in that country rested on the consent of the individuals affected by such relations, and of the inherent potency of the written monuments to maintain their own provisions; and, moreover, as a proof of the absence of any such power-holder as he had made the object of his vain inquiry.

What opinion the supposed traveller might have of this testimony would depend, perhaps, very much on the place of his nativity. He might at any rate be able to tell the supposed people that they were not, as they might have imagined, the only nation in the world glorying in such conceptions of itself; that, to his knowledge, the people

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of the United States of America had always
that this was precisely their own position.

Like the supposed traveller, I have regard
bound to search for a fact. I have, then, no polit
sophy to offer, by which the existence or non-ex
observed facts should be judged; nor do I p
argue for the existence of political facts from the
of other facts which are not political facts. I dc
pose to show, from principles assumed *a priori*,
tical energy has been actually exhibited here
beings; nor do I propose to show the same thin
clusions as to the necessary result of conditions c
climate, the relative situations of seas, rivers, n
and other geographical phenomena.

As I have no principles of political philosoph
with, I do not propose to use any observed facts
tions to prove the merit or demerit of any such
That such a method of testing political princ
proper one, and that it offers a subject wortl
severest study, I readily agree: but it is not tl
here considered.

Yet, without having any preconceived politica
to start with, by which to judge of the existenc
existence of observed facts, it is still necessar
some definite idea of the object of search. I am
to recognize any existing political fact, as a fact.
searching for a fact, something in the nature of a
of the fact sought is required. This I propose to
as definition, in distinction from doctrine. Tho
aware that some will say that such definition is
I am obliged to state it as definition, or as pr

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which need no proof, because I know of no proof that can be given.

I conceive that wherever human beings exist in society, some of them do, as a matter of fact, exercise a power over others, — a power operating more or less visibly, in some form, quite distinct from the merely casual exercise of superior force and cunning exhibited by brute beasts towards each other. It is an intelligent exercise of power; the power is consciously exercised by some in respect to others, who are conscious of its being so exercised.

The power so exercised is voluntary or autonomous in the hands of those who exercise it. It is to be recognized only as it is so exercised voluntarily or independently of control by any other holder of similar power.

The power so exercised is limited only by conditions of physical existence. Those who hold it, being creatures of a moral nature, are under the obligations of a moral standard of action, imposing duties on them in the exercise of the power, which duties they may recognize more or less distinctly. But the obligations imposed are not imposed under the power in question, and the possession of the power, as a fact, is determined independently of the observance of the obligation. Those who hold the power are not responsible under any power of the same sort, even so far as they are responsible at all.

The power is one which is exercised continuously, or as a constant force. It has never been apprehended as beginning to exist in the hands of any actual holders, but known only as it has been transmitted to them from some former holder. History, as distinguished from fable, myth, or allegory, does not record its inception, but recognizes it

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only as a power in operation, while tracing its trai from one holder to another; identifying it as t power, by whatever persons it may be exercised.

The power so held extends to all possible actio in respect to others, and, though not necessarily in respect to all such action, it extends to all suc in the sense that it is not separable in its possess tively to varieties of such action. In respect to eties of such action it must be held as a unit, if i at all. While it is capable of distribution, to a nite extent, in its exercise by agents, it is indi the hands of its ultimate possessors. The poss this power in respect to one form of human ac not be absolutely separate from the possession of power in respect to any other form of human acti

Whether as definition or as doctrine, these pro will probably be objectionable to some. All tha say in their defence is that, as definitions, they the object of my own search. Whether they some object which others may suppose ought to b ject of my search is a different matter, — one with really have no concern.

Some will say, perhaps, that no such power ex where. If this is true, then, of course, the power found here. Some may say that a power exists, s here otherwise described, but that it is divisible i session as well as in its exercise, and, moreover, tl been so held in division in this country. If this i of course, my definition fails in that respect. All t say is that I have not yet seen it so divided.

I have already forewarned the reader not to e

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array and balancing of "authorities," such as is proper in a matter of legal controversy. As I anticipate that the propriety of thus rejecting juristical authority on a matter of political fact may be questioned, I am also prepared for no slight censure for the manner in which I have presented the conclusions of some persons not now living, whose arguments on that subject have long been received at the North with almost as little question as if they had the stamp of inspiration. All that I can say in defence is, that whatever has been offered by anybody as argument must be judged by everybody else as argument: it cannot be received as authority. It is also just on my part to notify the reader that the conclusions on the matter of political fact which are here offered to his individual judgment are not in harmony with any advanced on the same subject by any considerable number of persons. Indeed, as far as I am aware, there is nobody now living who accepts similar conclusions, and but one other writer who ever presented a similar theory.

The only person, so far as I have been informed, who took the same view of the political history of the country, and who deduced similar conclusions as to the political status of the States of the Southern Confederacy at the close of the war, was the late Dr. O. A. Brownson, who announced them in several of the articles of his "Quarterly Review," published in 1864, particularly in an article entitled "Are the United States a Nation?" in the October number. Dr. Brownson also stated them more systematically in his "American Republic," published in 1865. But how far his views have had any acceptance, I have had no means of learning.

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I confess to feeling the presumption shown in oc
such an isolated position on a matter of general
and acknowledge that no excuse for making it kn
be deemed adequate, if such an excuse is needed.
it will be needed is for the reader to decide.
scribe my view of this position, I think I may a
words written in respect to ethical controversy
English author who has often battled single-hande
beliefs. Mr. John Henry Newman, now Cardin
man, in his "Grammar of Assent," p. 379, has
begin with expressing a sentiment which is habitua
thoughts whenever they are turned to the subject
tal and moral science, and which I am as willing
here to the evidences of religion, as it properly a
metaphysics or ethics, viz., that in these provinc
quiry egotism is true modesty. In religious inquir
us can speak only for himself, and for himself he ha
to speak. His own experiences are enough for hir
he cannot speak for others; he cannot lay down th
can only bring his own experiences to the comm
of psychological facts. He knows what has satis
satisfies himself; if it satisfies him, it is likely
others; if, as he believes and is sure, it is tru
approve itself to others also, for there is but o
And doubtless he does find in fact, that, allowin
difference of minds and of modes of speech, w
vinces him does convince others also."

It is the same in respect to recognizing the
superior. That is a question whereon "each c
speak only for himself, and for himself he has a
speak." It is a question of personal experien

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only authority to each one is the authority which each one finds sufficient to compel his own recognition.

While obliged to regret the isolation of my position in reference to the general treatment of the subject, I have the satisfaction of mentioning with gratitude my obligations to my kinsman, John C. Ropes, Esq., of the Boston bar, not only for the encouraging interest taken in the publication of my views, but also for his critical supervision of the whole as it has passed through the press.

It can hardly be necessary to remind the reader that the subject of this essay is one on which people not only differ, but about which they sometimes get very angry. I do not expect any one even to read opinions on this matter which militate with his own without strong feelings of opposition, and if my views are thought worthy of anybody's attention I may be sure there will be some whom they will not please. To use the words of De Tocqueville, in the preface to his work on the French Revolution, "I trust I have written this work without prejudice, but I do not claim to have written dispassionately." Whatever my feeling on the subject, I have only claimed the right to think and speak for myself. But I have had no intention to denounce any who, having the same right, have adopted different conclusions. I am not aware of having used language of denunciation, and should regret if any expressions of mine should be so regarded.

Boston, Sept. 15, 1881.

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THE THEORY

OF

OUR NATIONAL EXISTENCE.

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THE THEORY

OF

OUR NATIONAL EXISTENCE

CHAPTER I.

THE POLITICAL STATUS OF THE ELEVEN STATES OF THE CONFEDERACY IN CONSEQUENCE OF THE REBELLION, AS DESCRIBED BY PERSONS IN THE SEVERAL DEPARTMENTS OF THE GENERAL GOVERNMENT, IN OPINIONS OF JUSTICES OF THE SUPREME COURT, AND IN THE LANGUAGE OF PRESIDENTS AND OF CONGRESS ON RECONSTRUCTION.

IT is common to speak of some battles as having decided the fate of empires. The rhetorical force of the expression might lead us to forget, for the moment, that military success and defeat cannot in themselves, however decisive strategetically, indicate any political supremacy for the affirmance or denial of which the victor and the vanquished may respectively have taken up arms. A victory is decisive, in the sphere of political relations, only as being that which may have enabled one of the parties combatant to exhibit peacefully that sort of action which we call *government*, and which, as the exercise of dominion over persons and territory, is more continuously directed to civil than military affairs; and, until this action may have ensued, no historical statement of the political value of antecedent military results can be expressed.

The defeat of the armies under the command of General Lee and other military leaders commissioned by the con-

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federacy, allowed the exercise, within the terri
forcible separation from the Union had been r
arms, of whatever political authority had been r
by the victorious belligerent.[1]

In most parts of the world, the administr
action following after military success would b
viously shown in the exercise of what we are, ir
accustomed to discriminate as the executive fu
government; after which the legislative an
powers, when exercised in separation from the
would appear to follow. We may conceive, v
some difference in respect to the order of manif
these functions, as following victory in the fie
instances of a government like that of Russi
similar to the English; and there might be c
the legislative would appear as leading the
functions.

From the organization of government, here,
exhibition of authority must have occurred by th
persons severally exercising the executive, the l
or the judicial function; and, as the action of
tive and legislative is supposed to be ultimately
judicial inquiry under a written constitution, it
parently belong to the Supreme Court to indica
the nature, extent, and legal effect of any politi
exercised within the territory affected by partic
the war.

The political question, as to the existence of
in the Union, which is discussed in these pag
posed to be examined from that point of view i
must present itself to any person invested wi

[1] The date of "the close of the Rebellion was announced l
dent" by proclamation, bearing date Aug. 20, 1866, and this w
as the official date by Act of Congress, March 2, 1867. The
the general government had been unresisted in various States
earlier dates. See United States v. Anderson, 9 Wall. 59, 60.

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responsibility. Prominence has been given to some opinions delivered by various members of the Supreme Court, because, of all statements having the stamp of public station, bearing on questions of the political nature or *status* of the States, these are not only the fullest, but such as, above all others, have been expressed with the strongest presumption in favor of candid and practised deliberation, after dispassionate consideration of the best attainable arguments.

Still, it is herein assumed that, from the nature of the judicial function, in every country, it must have limitations as a means of determining political rights and obligations.[1] The *decisions* of the court are recognized to be the final arbitrament as to all private rights and obligations in cases at law, however dependent upon political doctrine. But, on the ground that the determination of political relations is beyond the scope of the judiciary, these *opinions* are not here presented as *authority*, but as on the same plane, as *testimony*, with others from some other sources. There will be no attempt to collate judicial *decisions*, as is done in legal treatises, with a view of deriving rules of law applicable to future cases.

The judiciary of the United States, by assuming jurisdiction of cases affecting persons and property within the districts which had been adversely occupied during the war, did thereby assert the authority in these localities of the government of the United States. This assertion was made also by executive and legislative action at the same time. We may believe that, in the popular estimate, this was all that needed, or could, be asserted on the part of the prevailing combatant.

[1] Compare Luther *v.* Borden, 7 How. 43, 47, 57; Rose *v.* Himely, 4 Cranch, 272; Gelston *v.* Hoyt, 3 Wheat. 324, 634; Williams *v.* The Suffolk Ins. Co., 13 Pet. 420; and the citation of these in White *v.* Hart, 13 Wall, 649, as noticed further on in this chapter.

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The Question before the Judiciary.

The question as to the nature, extent, and ef political power vindicated in the war has, how brought up by the inquiry, — whether the autho government of the United States, having been re-e should be regarded as having been, in the leg view, continuously of the same extent, within th as it had been before, and as it had been and co be within the other States; or whether it th during the war, and was, for any time after, diffe if so different, in what respects, and, incidentall *reason*, or upon what theory of the existence o call the United States of America.

This inquiry, if made judicially, could ari actions at law affecting the rights of private pe not in cases or controversies admitting a formal as to the political nature, effect, or consequen public events which had occurred; containing, i legal decision, a statement of the seat of ultima power as between any who might appear as the

In the reported cases before the Supreme C has been a general agreement that the States v stituted the Union before 1861, are now and after an interval terminating at some date late cessation of military operations, in the Union, a been before.

There has, however, been some disagreement continuation, during the interval, of the politica the States which had passed ordinances of sec in whose name as "the Confederate States" been levied to resist the civil and military autho government of the United States.

The inquiry as to the political nature of the of their abilities or disabilities as affected by the occurs most obviously in cases which arose, eith claim of right founded on acts of the governm

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Confederacy, or on some claim founded on acts of the government of some one of the States.

With regard to the first of these classes, it is enough, for the present purpose, to notice that the Supreme Court has, with little or no difference of opinion, held that such claims cannot be sustained in any case. Though ruling that it had existed as a recognized belligerent military force,[1] or *de facto* government so far as military operations were involved, the court holds the legislative acts of the Confederate government null and void.[2]

In support of this view, the court argues from the prohibition in the Constitution against any alliances or leagues between the States.[3]

In several cases of this class, it is also stated that this decision is not intended to apply at all to cases of claims founded on the acts of any one of the States which had sustained the Confederacy.[4]

In the cases arising on claims founded on acts of the State governments, it has invariably been assumed that some acts of such State governments must be held valid, while others may have been void.[5]

[1] Hanauer *v.* Woodruff, 15 Wall. 439; Williams *v.* Bruffy, 6 Otto, 176.

[2] Thorington *v.* Smith, 8 Wall. 1, 9; Delmas *v.* Ins. Co., 14 Wall. 65; Horn *v.* Lockhart, 17 Wall. 571; Dewing *v.* Perdicaries, 6 Otto, 193; Sprott *v.* United States, 20 Wall. 459; Williams *v.* Bruffy, 6 Otto, 176; also Shortridge *v.* Macon, District N. C., Johnson's Chase's Decisions, 144; and Keppel's Adm'r *v.* Petersburg R. R., District Va. ib. 167. Unless there is an exception in a qualified recognition of the currency of the Confederate government, as valid, in payments and contracts, to a certain extent. Thorington *v.* Smith, 8 Wall. 1; Delmas *v.* Ins. Co., 14 Wall. 665; Hanauer *v.* Woodruff, 15 Wall. 439. The Confederate notes cases, 19 Wall. 548; Keppel's Adm'r *v.* Petersburg R. R., Johnson's Chase's Decisions, 210.

[3] "The organization whose enactment is pleaded cannot therefore be regarded in this court as having any lawful existence." (Opinion by Field, J., no dissent), Williams *v.* Bruffy, 6 Otto, 176, 182.

[4] United States *v.* Keehler, 9 Wall. 83; Horne *v.* Lockhart, 17 Wall. 581; Williams *v.* Bruffy, 6 Otto, 192.

[5] Horn *v.* Lockhart, 17 Wall. 570; United States *v.* Ins. Cos., 22 Wall. 99; Sprott *v.* United States, 20 Wall. 459; with the other cases already cited.

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In these cases, the salient question has general to the existence of any *presumption* against the v any claim founded on the action of such governn ing from the general facts of the rebellion and th of such government, during the war and the so-c *construction* period.

It is for the most part in reference to this pre that those statements bearing on the political above stated, as to the existence of the States, by various members of the court, from which, wh livered in the name of the majority or as indivi senting opinions, passages are here cited.

In the case of Texas *v.* White, decided Decem 1868, 7 Wall. 700, the question as to this presump not appear; because, even admitting the presun favor of any act of the local authorities, the cc sidered the alleged facts as showing that the tran which the merits of the case depended had been aid of the rebellion. Ib. 733.

In this case of Texas *v.* White, suit was br the name of the State of Texas, by the governn existing under the State Constitution adopted which was one of the State governments declare by Congress, in the Acts of March 2, 1867, and 1867.[1]

The object of the suit was to recover certain bor ferred by the local authorities during the rebelli a preliminary question of the jurisdiction of the c raised by the objection, "that the State having se relations with a majority of the States of the Ui having by her ordinance of secession attempted

[1] A condensed narrative of the military and civil organization to the date of this case, had existed under the general policy Presidents Lincoln and Johnson is given by the reporter in his s the case. Ib. 702–708.

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off her allegiance to the Constitution and government of the United States, had so far changed her status as to be disabled from prosecuting suits in the national courts."

Having stated the objection, Mr. Chief Justice Chase, delivering the opinion of the court, proceeds to say, —

"If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it." Ib. 719.

From the frequent reference, with approval, which has been made to this opinion of the court, it should seem that, if any political doctrine, bearing on this point, can be got out of it by legal hermeneutics, it has been doctrine generally accepted by the national judiciary.

Bearing in mind the question here considered by the court, it is important to know, with some precision, what idea the Chief Justice attached to the term a *State*. For this reason, I give here some passages not so often cited in later cases, but which may be noticed further on in this inquiry.

The Chief Justice remarks, Ib. 720, —

"Some not unimportant aid, however, in ascertaining the true sense of the Constitution, may be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

"It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the

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people live; at other times it represents the combined idea territory, and government.

"It is not difficult to see that in all these senses the conception is that of a people or community. The people ever territory dwelling, either temporarily or permanently whether organized under a regular government, or united and less definite relations, constitute the state.

This is undoubtedly the fundamental idea upon which ican institutions of our own country are established. stated very clearly by an eminent judge[1] in one of the cases adjudicated by this court, and we are not aware of in any subsequent decision, of a different tenor.

"In the Constitution the term state frequently exp combined idea just noticed, of people, territory, and g A state, in the ordinary sense of the Constitution, i cal community of free citizens, occupying a territory boundaries, and organized under a government sanc limited by a written constitution, and established by sent of the governed. It is the union of such stat common constitution which forms the distinct and great unit which that Constitution designates as the United makes of the people and states which compose it one one country.

"The use of the word in this sense hardly requires mark. In the clauses which impose prohibitions upon in respect to the making of treaties, emitting of bills of laying duties of tonnage, and which guarantee to the St sentation in the House of Representatives and in the found some instances of this use in the Constitution. occur to every mind.

"But it is also used in its geographical sense, as in which require that a representative in Congress shall be

[1] Citing Penhallow v. Doane, 3 Dall. 93, in which Irede "A distinction was taken at the bar between a *State* and the *State*. It is a distinction I am not capable of comprehendin speaks of "all the citizens which compose that State," meani not the persons holding the elective franchise, the political the inhabitants generally; as he says, "In such governments, t sovereignty resides in the great body of the people . . . in capacity only," and "the whole community which forms such l

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tant of the State in which he shall be chosen, and that the trial of crimes shall be held in the State where committed.

"And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

"In this latter sense, the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

"In this clause a plain distinction is made between a State and the government of a State.

"Having thus ascertained the senses in which the word State is employed in the Constitution, we will proceed to consider the proper application of what has been said."

The Chief Justice proceeds, Ib. pp. 722–724, to describe the political transactions, in the State, intended to carry out the design of secession, and asks, Ib. 724,—

"Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

"It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

"The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not.

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. . . . And we have already

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had occasion to remark, at this term,[1] that 'the people of compose a State, having its own government, and endow the functions essential to separate and independent exist that 'without the States in union, there could be no su body as the United States.' Not only, therefore, can ther of separate and independent autonomy to the States th union under the Constitution; but it may be not unreas that the preservation of the States, and the maintenan governments, are as much within the design and care o stitution, as the preservation of the Union and the main the National government. The Constitution, in all its looks to an indestructible Union, composed of indestructil

"When, therefore, Texas became one of the United entered into an indissoluble relation. . . . There was n reconsideration or revocation, except through revolution, consent of the States.

"Considered therefore as transactions under the C the ordinance of secession, adopted by the convention, a by a majority of the citizens of Texas, and all the a legislature intended to give effect to that ordinance, lutely null. They were utterly without operation in obligations of the State, as a member of the Union, an citizen of the State, as a citizen of the United States perfect and unimpaired. It certainly follows that the not cease to be a State, nor her citizens to be citizens of If this were otherwise, the State must have become forei citizens foreigners. The war must have ceased to be a suppression of the rebellion, and must have become a w quest and subjugation.

"Our conclusion, therefore, is that Texas continue State, and a State of the Union, notwithstanding the t to which we have referred. And this conclusion, in our is not in conflict with any act or declaration of any dep the National government, but entirely in accordance with series of such acts and declarations since the first outbr rebellion."

While thus affirming the existence of the State

[1] The County of Lane v. The State of Oregon, 7 Wall.

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stituent member of the United States, the Chief Justice speaks of the existence of the State governments as a different matter.

The opinion continues from the last citation: —

"But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National government, so far, at least, as the institution and prosecution of a suit is concerned."

The Chief Justice proceeds, Ib. 727, to hold that "the governmental relations of Texas to the Union" did not remain "unaltered," and in his argument compares the States to citizens under the law of any one of the States: —

"The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. . . . All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion." [1]

The portion of the opinion which next follows, Ib. 727–732, has a political interest, as being a recognition of the validity, if not the policy, of President Johnson's measures in appointing provisional governors, and inaugurating new constitutions and State governments. But, considering the action of the President as "provisional," the Chief Justice also justifies the action of Congress, in "the acts

[1] Other passages from this part of the opinion as cited by Mr. Justice Bradley, in Keith v. Clark, will be also found in this chapter.

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known as the Reconstruction Acts," as founded derived from the constitutional guaranty of a r government to each State.

As to this portion of the opinion, it is of some in to bear in mind Chief Justice Chase's previous de the word *State*, as employed in that guaranty; unc he may, perhaps, have regarded Texas as a Stat any territory of the United States, with definite ries, might be called a State.[1]

In connection with this he says, in referenc emancipation proclamation and the amendment ing slavery, together with the conditions of amn

"Wherever the National forces obtained control, the came freemen. . . .

"The new freemen necessarily became part of the the people still constituted the State; for States, like i retain their identity, though changed to some extent in stituent elements. And it was the State, thus constituted, now entitled to the benefit of the constitutional guaranty."

If the court, in this case, considered Texas as subject for the benefit of the constitutional guar as any territory, with sufficient population, may b to the same, what is the value of the often cite sion, "an indestructible Union composed of inde States"?

If it was intended only to assert that Texas a habitants had not become foreign country and alie — this was something assumed by the governm the first, and was equally affirmed by those w regard the States as conquered, and by the adv the State suicide doctrine.

The merits of the case, as a claim for property been considered in this portion of the opinion.

[1] Compare the dissenting opinion by Grier, J., *post*, p.

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jority supported the claim of the State, as represented by the then existing government, to recover the bonds which had been transferred to the defendants, in 1865–66, by the local authorities supporting the Confederacy; after the legislature had repealed an earlier State law restricting their assignment. In this part of the opinion, it is said, Ib. 732, —

"The legislature of Texas, at the time of the repeal, constituted one of the departments of a State government established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful acts. And yet, it is an historical fact that the government of Texas, then in full control of the State, was its only actual government; and certainly, if Texas had been a separate State, and not one of the United States, the new government having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during the whole period of its existence, as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary, as to the United States.

"It is not necessary to attempt any exact definitions, within which the acts of such a State government must be treated as valid or invalid."

The opinion briefly states that, while action affecting ordinary civil relations is, generally speaking, valid, in this particular case, the "purpose" of the act of the local legislature authorizing the sale, "was undoubtedly unlawful, for the acts which it contemplated are, within the express definition of the Constitution, treasonable." Ib. 733.

The opinion concludes, —

"On the whole case, therefore, our conclusion is, that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly." Ib. 736.

Notwithstanding the length of these citations from the

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opinion of the court, the positions taken by t members are too important, in the political a to be here noticed, on their own account and a ing, by contrast, the opinion delivered by Ch Mr. Justice Grier dissented, both as to the q jurisdiction and that on the merits. In the sepa ion delivered by him, he observes: —

"The original jurisdiction of this court can be invol one of the United States. The Territories have no suc ferred on them by the Constitution, nor have the Indiar are under the protection of the military authorities of ment.

"Is Texas one of these United States? Or was she time this bill was filed, or since?

"This is to be decided as *a political fact*, not as a *l* This court is bound to know and notice the public hi nation." Ib. 737.

Mr. Justice Grier cited here the language of C. J., in Hepburn *v.* Elzey, 2 Cranch, 452, a constitutes a State of the United States,[1] as a view of a State contended for by counsel, and apparently in the opinion of the court, and sa political situation at that time, —

"It is true that no organized rebellion now exists th courts of the United States now exercise jurisdiction ov ple of that province. But this is no test of the State's Union; Dacotah is no State, and yet the courts of States administer justice there as they do in Texas. tribes who are governed by military force cannot claim of the Union. Wherein does the condition of Texas theirs?" Ib. 738.

Mr. Justice Grier protested against any charge sistency with his previous judicial opinions, ref

[1] The same view had been taken in Scott *v.* Jones, 5 Ho Cherokee Nation *v.* Georgia, 5 Pet. 118.

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conclusion in this case to his acquiescence in the position taken by the government.

"I do not consider myself bound to express any opinion, judicially, as to the constitutional rights of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination and keep her in pupilage. I can only submit to *the fact* as decided by the political position of the government, and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. *Politically*, Texas is not *a State in this Union*. Whether rightfully out of it or not, is a question not before the court." Ib. 739.

These remarks are addressed to the question of jurisdiction. But, on the question of right of recovery, Judge Grier also dissented. In this connection, he said, —

"Having relied upon one fiction, namely, that she *is* a State in the Union, she now relies upon a second one, which she wishes the court to adopt, that she was not a State at all during the five years that she was in rebellion. She now sets up the plea of *insanity*, and asks the court to treat all her acts made during the disease as void.

"We have had some very astute logic to prove that, judicially, she was not a State at all, although governed by her own legislature and executive as 'a distinct political body.'

"The ordinance of secession was adopted by the convention, on the 18th of February, 1861; submitted to a vote of the people and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still it was the sovereign act of a sovereign State, and the verdict on the trial of this question 'by battle,'[1] as

[1] In the foot-note, Prize Cases, 2 Black. 673. The opinion of the court in that case had been delivered by Mr. Justice Grier, and, from his language in that instance, it must be inferred that he held that view of the Union which regards each State as always being completely and severally sovereign, and the war as an international war throughout. His expressions, in Texas v. White, must be understood as in harmony with the same doctrine, and it must be supposed that he regarded the State as territory, held by conquest.

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to her right to secede, has been against her. But that v not settle any question not involved in the case.[1] It did the question of her right to plead insanity," &c. Ib. 740.

Mr. Justice Swayne said only,[2] —

"I concur with my brother Grier as to the incapaci State of Texas, in her present condition, to maintain a suit in this court. The question, in my judgment, is one i to which this court is bound by the action of the legislativ ment of the government.

"Upon the merits of the case, I agree with the major brethren.

"I am authorized to say that my brother Miller unite in these views." Ib. 741.

In White v. Hart, 13 Wall. 646, the question of pacity of a State, as affected by the rebellion, sented, in an aspect still more clearly political, opinion of the court, delivered by Mr. Justice who, in his statement of the case, says, Ib. 648, —

"From the close of the rebellion until Georgia was r her normal relations and functions in the Union, she was under the laws of the United States known as the Reco Acts. Under these laws her present constitution wa adopted, and submitted to Congress."

After recapitulating the "terms of her rehabi requiring the modification of this constitution, u measures of Congress ending in the Act July 15, U. S. Stat. 363), he says, —

"This act removed the last of the disabilities and pena were visited upon her for her share of the guilt of the

[1] I suppose Mr. Justice Grier to have meant, — not invol issue, viz., whether the State had, or had not, the right to secede

[2] It is specially important to notice the position taken in Justices Swayne and Miller, because they severally delivered th the court in the two later cases, from which I propose to cit White v. Hart, and Keith v. Clark.

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The condonation by the national government thus became complete." Ib. 648.

In this case, the question presented was as to the protection of a contract made in 1859 against a provision in the State constitution of Georgia of 1868, against enforcing "any debt, the consideration of which was a slave or the hire thereof."

The point was taken — that the clause in the Constitution of the United States against impairing the obligation of contracts did not apply, —

Because, as a "first proposition," at the adoption of this state constitution, "Georgia was not a State of the Union; that she had sundered her connection as such, and was a conquered territory, wholly at the mercy of the conqueror."

And because, as a "third proposition," her constitution was adopted under the dictation and coercion of Congress," so that the prohibition in the State constitution was valid, as being the action of Congress. Ib. 649.

As to the last of these propositions, the court says, —

"The third of these propositions is clearly unsound, and requires only a few remarks. Congress authorized the State to frame a new constitution, and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. The State is estopped to assail it upon such an assumption. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it." Ib. 649.[1]

[1] A note in the report refers to the cases cited, *ante*, p. 5, note.

Here the court, as I understand it, only assumes that Congress must have had sufficient evidence. Further on it seems to be held that the court is obliged to accept any view of the *status* of the States taken by Congress. I

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The view of the nature of the States and the Uni tained in the opinion of the court, is particularly able for being presented as in harmony with the Congress in the Reconstruction Acts. The cou Ib. 649, —

"The subject presented by the first proposition has bee ered, under some of its aspects, several times by this co need do little more upon this occasion than to reaffirm heretofore expressed, and add such further remarks as for by the exigencies of the case before us.

"The National Constitution was, as its preamble recites and established by the people of the United States. It cr a confederacy of States, but a government of individual sumed that the government and the Union which it create States which were incorporated into the Union, would be tible and perpetual; and, as far as human means could a such a work, it intended to make them so. . . . For al poses of the National government, the people of the Uni are an integral, and not a composite mass, and their unity tity, in this view of the subject, are not affected by thei tion by State lines, for the purposes of State government administration. Considered in this connection, the Stat ganisms for the performance of their appropriate functi vital system of the larger polity, of which, in this aspect ject, they form a part, and which would perish if they wer from existence and ceased to perform their allotted w doctrine of secession is a doctrine of treason. . . . In son it [the rebellion] was not unlike the insurrection of a other municipal division of territory against the State t belongs. . . .

"The power exercised in putting down the late rebellic expressly by the Constitution to Congress. That body

have, *ante*, p. 5, recognized a limitation of the judicial function o cal question: but not meaning to the extent that all political a legislature is binding on the court. The recognition of a "poli ment" determining the nature of the constitutional government ciary, is, I think, a novelty. The boast used to be that the co superior, or, at least, independent. Comp. Story Comm. ch. 38.

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laws, and the President executed them. The granted power carried with it not only the right to use the requisite means, but it reached farther, and carried with it also authority to guard against the renewal of the conflict, and to remedy the evils arising from it; so far as they could be effected by appropriate legislation.[1] At no time were the rebellious States out of the pale of the Union. Their rights under the Constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected, and remained the same. A citizen is still a citizen, though guilty of crime and visited with punishment. His political rights may be put in abeyance or forfeited. The result depends upon the rule, as defined in the law, of the sovereign against whom he has offended. If he lose his rights, he escapes none of his disabilities and liabilities which before subsisted. Certainly he can have no new rights or immunities arising from his crime. These analogies of the county and the citizen are not inapplicable, by way of illustration, to the condition of the rebel States, during the rebellion. The legislation of Congress shows that these were the views entertained by that department of the government." Ib. 651.

The opinion notices the Reconstruction Acts as avoiding the phraseology employed when new States are declared "admitted into the Union," but reading, in distinction, the said State "shall be entitled and admitted to representation in Congress, as a State in the Union," &c., and proceeds, —

"The different language employed in the two classes of cases evinces clearly that, in the judgment of Congress, the reconstructed States had not been out of the Union, and that to bring them back into full communion with the loyal States, nothing was necessary but to permit them to restore their representation in Congress. Without reference to this element of the case, we should have come to the same conclusion. But the fact is one of great weight in the consideration of the subject, and we think it conclusive upon the

[1] The foot-note for this paragraph is Stewart v. Kahn, 11 Wall. 506, in which case the opinion was delivered by Mr. Justice Swayne. But the propositions on the page cited are hardly equal, in political significance, to the rather remarkable statement for which it is here referred to.

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judicial department of the government." Ib. citing Luther den, 7 How. 57.[1]

A disagreement as to the presumption in favo validity of the acts of the governments of the Stat promised by the rebellion, appears in the case of K Clark, 7 Otto, 454, decided October Term, 1878.

In the opinions delivered for the majority and of the three dissenting Justices, the position of th governments from the commencement of the re onwards, is examined at greater length, and with tion of greater variety of political doctrine, than former case. This may justify a somewhat extend tion from each opinion.

In this case the plaintiff had sued the defendan State courts for the sum of $40, which he had pai protest, to the defendant, a collector of taxes for t of Tennessee, after he had tendered, in payment amount of tax due, the same sum in the circulati of the State Bank of Tennessee, which had bee after May 6, 1861.

Mr. Justice Miller, delivering the opinion of th proceeds to consider the question of the effect of war on the contract, as to notes issued subseq May 6, 1861.

"We are invited now to examine that point and to hold all such notes the 12th section creates no valid contract."

"In entering upon this inquiry, we start with the propo unless there is something in the relations of the State of and the bank, after the date mentioned, to the governm

[1] Mr. Chief Justice Chase dissented from the decision of th giving the ground of his opinion in Osborn v. Nicholson, Ib. 6 contracts for sale of slaves were contrary to public policy. allude to the political question.

[2] The opinion of the court has been given in the Report Weekly No. Jan. 29, 1879.

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United States, or something in the circumstances under which the notes now sued on were issued, that will repel the presumption of a contract under the 12th section, or will take the contract out of the operation of the protecting clause of the Federal Constitution; this court has established already that there was a valid contract to receive them for taxes, and that the law which forbade this to be done is unconstitutional and void.

"Those who assert the exception of these notes from the general proposition are not very well agreed as to the reasons on which it shall rest, and we must confess that, as they are presented to us, they are somewhat vague and shadowy. They may all, however, as far as we understand them, be classed under three principal heads.

"1. The first is to us an entirely new proposition, urged with much earnestness by the counsel who argued the case orally for the defendant.

"It is, in substance, that what was called the State of Tennessee prior to the 6th May, 1861, became, by the ordinance of secession passed on that day, subdivided into two distinct political entities, each of which was a State of Tennessee. One of them was loyal to the Federal government, the other was engaged in rebellion against it. One State was composed of the minority who did not favor secession, the other of the majority who did. That these two States of Tennessee engaged in a public war against each other, to which all the legal relations, rights, and obligations of a public war attached. That the government of the United States was the ally of the loyal State of Tennessee and the confederated rebel States were the allies of the disloyal State of Tennessee. That the loyal State of Tennessee, with the aid of her ally, conquered and subjugated the disloyal State of Tennessee, and by right of conquest imposed upon the latter such measure of punishment and such system of law as it chose, and that by the law of conquest it had the right to do this. That one of the laws so imposed by the conquering State of Tennessee on the conquered State of Tennessee was this one, declaring that the issues of the bank during the temporary control of affairs by the rebellious State was to be held void; and that, as conqueror and by right of conquest, the loyal State had power to enact this as a valid law.

"It is a sufficient answer to this fanciful theory, that the division

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of the State into two States never had any actual exist
as we shall show hereafter, there has never been but o
society in existence as an organized State of Tennessee, fr
of its admission to the Union in 1796 to the present tim
is a mere chimera to assert that one State of Tennessee
by force of arms another State of Tennessee, and im
upon it; and finally, that the logical legerdemain by
State goes into rebellion, and makes, while thus situate
for the support of the government in its ordinary and
tions, which are necessary to the existence of social life
by reason of being conquered, repudiates these contracts
to understand as similar physical performances on the st

Mr. Justice Miller, next considers the second pr
which had been advanced, and which he thus sets

"2. The second proposition is a modification of this, a
more serious attention. It is, as we understand it, that
eleven States who passed ordinances of secession and joi
called Confederate States so far succeeded in their attem
rate themselves from the federal government that, during
in which the rebellion maintained its organization, those
in fact no longer a part of the Union, or, if so, the indivi
by reason of their rebellious attitude, were mere usurpi
all of whose acts of legislation or administration are voi
they are ratified by positive laws enacted since the res
are recognized as valid on the principles of comity or su

"We cannot agree to this doctrine. It is opposed by
ent powers which attach to every organized political
sessed of the right of self-government; it is opposed to the
principles of public international law; and it is opposed
considered decisions of this court. 'Nations or States,'
'are bodies politic,' &c."

The opinion proceeds, ib. 459, 460, at some len
ing quotations from Vattel, Cicero, Wheaton,
existence of nations, or states in the same sens
ferring to England and France during periods
tionary change of dynasty, as affording some pa
the case before the court; saying, in continuatio

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"The political society which in 1796 became a State of the Union, by the name of the State of Tennessee, is the same which is now represented as one of those States in the Congress of the United States. Not only is it the same body politic now; but it has always been the same. There has been perpetual succession and perpetual identity. There has from that time always been a State of Tennessee, and the same State of Tennessee. Its executive, its legislative, its judicial departments have continued without interruption and in regular order. It has changed, modified, and reconstructed its organic law, or State constitution, more than once. It has done this, before the rebellion, during the rebellion, and since the rebellion. And it was always done by the collective authority and in the name of the same body of people constituting the political society known as the State of Tennessee.

"This political body has not only been all this time a State, and the same State, but it has always been one of the United States — a State of the Union. Under the Constitution of the United States, by virtue of which Tennessee was born into the family of States, she had no lawful power to depart from that Union. The effort which she made to do so, if it had been successful, would have been so in spite of the Constitution, by reason of that force which in many other instances establishes for itself a status, which must be recognized as a fact, without reference to any question of right, and which in this case would have been, to the extent of its success, a destruction of that Constitution. Failing to do this, the State remained a State of the Union. She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement."

The opinion here cites the decision in Texas *v.* White, and an extract from Chief Justice Chase's opinion, herein already given, *ante*, p. 12, and from the language used by Mr. Justice Swayne, in White *v.* Hart, *ante* p. 21, with his argument from the Reconstruction acts, adding, —

"These cases, and especially that of Texas *v.* White, have been repeatedly cited in this court with approval, and the doctrine they assert,[1] must be considered as established, in this forum at least." Ib. 462.

[1] As I have read those opinions they agree only in using the same verbal formula, — that the eleven States have always been States of the Union

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As to reasons coming under the third head for these notes from the "general proposition," M Miller, in the opinion, says, Ib. 463, —

"3. The third proposition on which the judgment of of Tennessee is supported is, that the notes on which th brought were issued in aid of the rebellion, to support th tion against the lawful authority of the United States, an fore void for all purposes.

"The principle stated in this proposition, if the facts come within it, is one which has repeatedly been discus court. The decisions establish the doctrine that no contract, the consideration of which was something do done by the promisee, the purpose of which was to aid the rebellion, or give aid and comfort to the enemies of States in the prosecution of that war, is a valid promise by reason of the turpitude of the consideration."[1] Ib.

The doctrine of the court on this point is on must of necessity be maintained by the judici any view of the nature of the Union which exc right of State secession and justifies the action o ernment in resisting the effort to maintain it. A there could be no disagreement in the court. I clusion of the opinion, it is stated, —

"There is, however, nothing in the case before us to conclusion that these notes were issued for the purpos the rebellion, or in violation of the laws or the Constitu United States. There is no plea of that kind in the r such question was submitted to the jury which tried the We cannot infer, then, that these notes were issued in

But which doctrine does Mr. Justice Miller take as establisl Chief Justice Chase — that they continued States, as any cert and inhabitants constitute a State of the United States, or tha tice Swayne, — that they continued States, as political persona to a sovereign general government?

[1] The cases cited are Texas v. White, 7 Wall. 700, 733 Doane, 12 Wall. 345; Horn v. Lockhart, 17 Wall. 570; Spr States, 20 Wall. 459; Williams v. Bruffy, 6 Otto, 176.

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any federal authority. On the other hand, if the fact be so, nothing can be easier than to plead it and prove it. . . . To undertake to assume the facts which are necessary to their invalidity on this record is to give to conjecture the place of proof, and to rest a judgment of the utmost importance on the existence of facts not found in the record, nor proved by any evidence of which this court can take judicial notice." Ib. 466.

The decision of the majority was, to reverse the decisions of the courts below, on the ground that the original contract of the State with the bill-holders was protected by the clause in the Constitution against impairing contracts by State laws. Ib. 466.

From this judgment Waite, Chief Justice, and Bradley and Harlan, Justices, dissented, each delivering an opinion.

The reasons given by the Chief Justice for his dissent, Ib. 467, are founded on reasons of the third class, as discriminated in the opinion of the court, without any consideration of the position of the State government in respect to the people of the State, or the position of the State as a member of the Union. The Chief Justice argued that, from the State's constitutional amendment of June 26, 1865, declaring null and void all issues by the Bank, after May 6, 1861, and from the judgment rendered by the highest court of the State against the validity of the tender in this case, the presumption is, that the notes were issued in aid of the rebellion, and the plaintiff was then required to overcome a *prima facie* case against him.

Mr. Justice Harlan bases his dissent more on political considerations, harmonizing with the arguments referred to in the opinion of the court under the first head, as to the general invalidity of the acts of those who exercised the powers of government in Tennessee during the war. Ib. 479.

"It was because the State, through directors of its own appointment, had the absolute control of the operations of the bank, owning

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its capital and enjoying its profits, that it made the agree
tained in the 12th section of the charter. . . . But it is
served that the State which made this contract with no
was the State which was represented by the lawful g
thereof. . . . It was not an agreement to receive notes iss
the orders of usurping directors, or by directors appoin
exercising their functions under, any revolutionary go
which, by violence, should displace the lawful governm
State. Upon the temporary overthrow of the latter go
on the 6th of May, 1861, all the State institutions, incl
Bank of Tennessee, were seized by the usurping governn
And this view does no injustice to citizens of Tennesse
ceived the notes of the bank in the ordinary course of
They were aware of the fact that these notes were issued
olutionary authority. They did not take them upon the
the lawful government, or upon any faith they had in it
tion. They took them upon the credit of the usurping
ernment, under whose authority and for whose benefit
issued, and which government, at that time, was regard
mass of the people of Tennessee, as established upon a
and enduring foundation." . . .

Mr. Justice Harlan further holds, Ib. 481, that

. . . " it is immaterial whether the notes were or were
in direct aid of the rebellion. They were the obligations
tution controlled and managed by a revolutionary usurpi
ment, in its name, for its benefit, and to prevent the res
the lawful State government. It was that revolutiona
ment which undertook to withdraw the State of Tenness
allegiance to the Federal government, and make it one o
federate States. When, therefore, the people of Tenn
recognized the authority of the United States, assemble
delegates in convention in January, 1865," &c.

After allowing that some acts of the usurpin
ment may be held valid, Mr. Justice Harl
Ib. 483, —

" Tennessee, as one of the United States, cannot be u
stitutional duty to recognize the governmental obligatio

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who, by revolution, and in violation of the Federal Constitution, overthrew the legitimate State government, not because of its administration of the internal affairs of that State, but solely because of its adherence to the Federal Union, and its refusal to acknowledge the authority of the Confederate government," &c.

According to the view taken by Mr. Justice Harlan, it was the State of Tennessee, as a member of the Union, which had suffered usurpation of its government by some persons not identical with the people of the State.

In the opinion delivered by Mr. Justice Bradley, the State governments of the war period are also designated "usurping governments." But a somewhat different view seems to have been taken, either of the person usurping, or of the nature and proper place of the power usurped. The opinion is stated at such length, that only the most material passages, relative to this view, can here be given.

Judge Bradley presents the question as follows, Ib. 472, —

"In favor of the proposition that the lawful State government, reorganized after the rebellion, is bound to recognize the bills in question, it is contended that the State of Tennessee has always remained the same State; and that, unless it can be shown affirmatively that its acts and proceedings were intended to aid the prosecution of the rebellion, they are all valid and binding on the reconstructed State.

"The latter proposition I deny. The State can act only by its constituted authorities, — in other words, by its government; and if that government is a usurping and illegal government, the State itself and the legal government which takes the place of the usurping government, are not bound by its acts. . . . Ib. 474.

"I deny the assumption that the governments of the insurgent States were lawful governments. I believe, and hold, that they were usurping governments. I understand this to have been the opinion of the court in Texas v. White, 7 Wall. 700. The very argument in that case is, that whilst the State, as a community of people, remained a State rightfully belonging to the United States,

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the government of the State had passed into relations e
normal to the conditions of its constitutional existence
the war closed,' says Mr. Chief Justice Chase, speakir
court,[1] 'there was no government in the State except
had been organized for the purpose of waging war a
United States. That government immediately disappea
chief functionaries left the State. Many of the subordin
followed their example. Legal responsibilities were a
greatly impaired.' Again he says, 'There being, then,
ment in Texas in constitutional relations with the Union,
the duty of the United States to provide for the restorat
government.' Again, in speaking of the power and du
gress to guarantee to each State a republican governme
necessary right which follows therefrom, to decide what g
is established in each State, the Chief Justice makes the
quotation from the opinion of Mr. Chief Justice Taney,
of Luther v. Borden, 7 How. 1. . . .

"Mr. Chief Justice Chase proceeds to say, 'This is the l
the late Chief Justice, speaking for this court, in a case fi
Island, arising from the organization of opposing gove
that State. And we think that the principle sanctioned
be applied, with even more propriety, in the case of a
prived of all rightful government by revolutionary violer
necessarily limited to cases where the rightful governm
subverted, or in imminent danger of being overthrown
posing government, set up by force within the State.'"

From the citation of these parts of Chief Justi
opinion, and particularly of that relying on the
land case, it would seem that, in Mr. Justice Brad
ception of the usurpation, it was usurpation as a
State, or people of a State, — a loyal State, a loyal
a State, or at least a politically not-guilty-of-any
particular State, or people of a State.

But, from the passages immediately following in
ion, it might be inferred that the usurpation had ra

[1] The passage cited is 7 Wall. 728. See *ante*, p. 13, n

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against the government of the United States, without reference to State organization, and that the powers usurped were those ordinarily exercised by the general government, in and for the United States generally, —

"The actual course of things taken in the seceding States, so fully detailed by the Chief Justice in Texas *v.* White, are demonstrative, it seems to me, of the position which I have assumed. The several State governments existing or newly organized at the times when the ordinances of secession were respectively adopted, assumed all the branches of sovereignty belonging to the Federal government. The right to declare war, &c. . . . were usurped by the said State governments, either singly, or in concert and confederacy with the others. They assumed to sever the connection between their respective communities and the government of the United States, and to exercise the just powers belonging to that government. That such governments should be denominated legal State governments in this country where the Constitution of the United States is and ought to be the supreme law of the land, seems to be most remarkable. The proposition assumes that the connection between the States and the general government is a mere bargain or contract, which, if broken, — though unlawfully broken, — still leaves the States in rightful possession of all their pristine autonomy and authority as States.

"I do not so read the constitution of government under which we live. Our government is a mixed government, — partly state, partly national. The people of the United States, as one great political community, have willed that a certain portion of the government . . . should be deposited in and exercised by a national government; and that all matters of merely local interest should be deposited in and exercised by the State governments. This division of governmental powers is fundamental and organic. It is not merely a bargain between States. It is part of our fundamental political organization. Any State attempting to violate this constitution of things not only breaks the fundamental law, but, if it establishes a government in conformity with its views, that government is a usurping government, — a revolutionary government, — as much so as would be an independent government set up by any particular county in a State. . . .

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"I do not mean to say that States are mere counties or provinces.[1] But I do mean to say that the political relation of the people of the several States to the Constitution and government of the United States is such, that if a State government attempt to sever that relation, and if it actually sever it by assuming and exercising the functions of the Federal government, it becomes a usurping government.

"We have always held, it is true, that, in the interests of order and for the promotion of justice, the courts ought to regard as valid all those acts of the State governments which were received and observed as laws for the government of the people in their relations with each other, so far as it can be done without recognizing and confirming what was actually done in aid of the rebellion." Ib. 476.

But Mr. Justice Bradley does not explain how the courts are to apply this, either by admitting or denying a presumption in favor or against the acts of such governments in cases before them; and, from the remainder of the opinion, it would appear that he considered it rather a political question, and that all claims of right resting on the action of the State government during the war were dependent on some ratification by the new "lawful State governments." He says, Ib. 478, —

"It is undoubtedly true that, when revolutions in governments occur, the new governments do often, as matter of policy, and to prevent individual distress among the citizens, assume the obligations of the governments to which they succeed. But this is done from motives of public policy only, and is not submitted to as a matter of absolute right. Such was clearly the relation of the lawful State governments to the obligations of the usurping governments at the close of the civil war in this country. They could assume them or not as they saw fit."

In this connection, he refers to the repudiation of these claims in the State Constitution of 1865.

[1] This portion of Mr. Justice Bradley's opinion savors more of Mr. Justice Swayne than of Mr. Chief Justice Chase. Compare, *ante*, p. 21.

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But it is not necessary to cite from this portion of the opinion, as I have not proposed to consider any particular application of the legal principle, further than may be a means of deriving some political doctrine of the position of the States. In which respect, however, the following passages, in conclusion, are important: —

"Whether the community of people constituting the several States remained States during the insurrection is of no consequence to the argument. The question is, whether the State governments were or were not legal governments, and whether the obligations by them assumed are binding upon the lawful government of the State.

"That the acts of secession were void, of course no one denies. The civil war was carried on by the United States to demonstrate their nullity. But neither has that any thing to do with the question as to the validity of the State governments which waged war against the United States; except to make it more certain and indubitable that they were usurping governments." Ib. 478.

Mr. Justice Bradley adds in concluding his opinion, —

"It seems to me, that the attempt to fasten upon the lawful government of Tennessee, an obligation to receive, as cash, bills that were issued under the authority of the usurping government of that State, whilst it was engaged in a deadly war against the government of the United States, is calculated to introduce evils of great magnitude; that it will ultimately lead to the recognition of the war debts of the seceding States, notwithstanding the prohibition of the XIVth amendment of the Constitution. But this I would regard as a far less evil than the establishment of doctrines at war, as I think, with the true principles of our national government, as well as with the established rules of public law."

As it was assumed in beginning this inquiry that, to ascertain what political authority had been maintained by the victorious belligerent, it was necessary to look at the action of the government representing that belligerent, in the exercise of its several functions, the only judicial opinions which it is important to consider are those of the

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national judiciary. It would only be matter of then, in strict consistency, to learn the opinions present courts of the eleven States of the Co as to the lawfulness of the governments of their States during the period which was referred Supreme Court in the cases which have been ci

Although it is here assumed that the determ political doctrine is not within the sphere of t function, the citations from opinions given b judges are not presented merely as views of pr viduals. Having been expressed in cases actua ing rights and obligations of private persons, t are on public record, as having been, in a certa the basis of the government's action, in admini law. They have, to a certain extent, become political fact. Under the same view of the co political truth, the language of Presidents and o will not here be cited as expression of author trine; but so far only as it may be regarded been, in specific instances, a basis for either e legislative action, and so have become, more or ter of political fact.

For this reason I do not attempt, by any cit their respective messages, proclamations, or ot statements, to present either President Lincoln' dent Johnson's general view of the nature and the States in the Union.

So far as Mr. Lincoln's methods of State r were sanctioned by Congress, they were so as b

[1] From cases in the State courts cited in United States (Confederate States), it would appear that they have alm affirmed their State governments to have been lawful gover the war and to have had no idea of a usurpation.

[2] A summary view of Mr. Lincoln's general idea on this i in H. J. Raymond's Life, &c. of Lincoln, 12mo, 451, and in of the 8vo edition.

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sitated, for a certain limited period, by the conditions of a state of war. A difference of action on this subject could hardly arise among those who all equally assumed the right and duty of the general government to resist secession as rebellion,[1] until the conditions of belligerency had ceased to complicate the question. This cannot be said to have been the state of things until after Mr. Lincoln's death.

Even if it could be shown that the view finally acted upon in the Reconstruction legislation of 1867 was irreconcilable with Mr. Lincoln's own plan of "restoration," the course taken by Congress in that matter was begun in his lifetime; apparently on the initiative given by his message to Congress with the proclamation of amnesty, both dated Dec. 8, 1863. The proclamation recites, —

"*Whereas*, in and by the Constitution of the United States, it is provided that the President 'shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment;' and whereas a rebellion now exists whereby the loyal State governments of several States have for a long time been subverted, and many persons have committed, and are now guilty of treason against the United States," &c.

After stating the conditions of the proffered amnesty, the President makes known that, —

"Whenever . . . a number of persons . . . not less than . . . shall re-establish a State government which shall be republican, . . . such government of the State, and the State, shall receive thereunder the benefit of the constitutional guaranty which declares," &c. 13 U. S. Stat. 738, App.

[1] It should be remembered that agreement in this course of *action* by no means involved harmony in political *theory*, and that the right and duty were strenuously contested, in the beginning, by many who were not citizens of the Confederate States. On each of these points compare Macpherson's Hist. pp. 48–90, under "The proceedings of the government in relation to the secession movement." Period, December 1860 to May 1861.

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In the Message of the same date, when referri offer made in the proclamation, the President, sp the constitutional guaranty, says: —

"But why tender the benefits of this provision only government in this particular way?[1] This section of tution contemplates a case wherein the element withi favorable to a republican government in the Union, feeble for an opposite and hostile element, external, or the State, and such are precisely the cases with which dealing."[2] Macpherson Pol. Hist. 146.

Further on in the Message, the President says

"The suggestion in the proclamation, as to main political frame-work of the States on what is called tion, is made in the hope that it may do good withou harm."

The Message did not invite the action of but, in the conclusion of the Proclamation, the said, —

"While the mode presented is the best the Execut gest, with his present impressions, it must not be und no other possible mode would be acceptable." Macp Hist. 147, 148.

Whatever may have been Mr. Lincoln's the origin of the Constitution, it is clear that he sumed the continued existence of the eleven St Confederacy, as political bodies remaining stil either in or out of the Union; though, in e being for the time "out of their practical rel

[1] It is not clear what "particular way" Mr. Lincoln refer

[2] If the theory of a usurping government, supported by numbers against some unknown handful of loyal people, sta State, is to be held statesmanlike, and to be accepted in our p Lincoln ought, in simple justice, have his share, as one at le patentees; if, indeed, the whole credit does not belong to him, discoverer.

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use his own phrase, to the United States, or to the nation, or to the government, or to the other States.[1]

Although the President had not directly invited the action of Congress, the House of Representatives on the motion of Mr. H. Winter Davis, Dec. 15, 1863 (House Journal, 1st Sess. 38th Cong. p. 57), referred to a select committee "so much of the Message as relates to the duty of the United States to guarantee a republican form of government to the States in which the governments recognized by the United States have been abrogated or overthrown," with instructions "to report the bills necessary and proper for carrying into execution the foregoing guaranty" (vote 89 to 80). The bill reported Feb. 16, 1864, bill No. 244 of 38th Congress, Ib. p. 624, entitled *a bill to guarantee to certain States whose governments have been usurped or overthrown, a republican form of government*, after undergoing amendments,[2] finally passed the Senate and House July 2, 1864, but was not signed by the President; the Congress adjourning the same day, *sine die*. A copy of the bill was published, as appended to Mr. Lincoln's proclamation of July 8, 1864, in which he speaks of it as containing "among other things a plan for restoring the States in rebellion to their proper practical relation in the Union," &c. Macpherson Hist. 318; 13 U. S. Stat. 744.

[1] Some further remarks on Mr. Lincoln's views on this matter will be found further on in Chapter VII.

[2] The bill as amended before the final vote had as preamble, —

[a] "*Whereas*, the so-called Confederate States are a public enemy, waging an unjust war, whose injustice is so glaring that they have no right to claim the mitigation of the extreme rights of war which are accorded by modern usage to an enemy who has a right to consider the war a just one; [b] *and whereas*, none of the States which, by a regularly recorded majority of its citizens, have joined the so-called Southern Confederacy, can be considered and treated as entitled to be represented in Congress, or to take any part in the political government of the Union: Therefore —" This preamble was rejected by the House of Representatives; vote 75 to 57. Macpherson Hist. 317; House Journal 1st Sess. 38th Congress, 624.

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There is nothing in the body of the bill (13 745, App.) to explain how a deficiency of repu ernment, calling for the exercise of the duty o had occurred in any of the States which, in tl tion, are designated only as "the States rebellion against the United States;" no S designated by name anywhere in the bill; and assertion that no government was then existi States, such as is made in the Reconstructi 1867.

The plan of the bill differed from that of Mr. directing the call for a convention in the sev referred to, for the purpose of framing a new co which should contain certain provisions, respecti ity to office, involuntary servitude, and payme "created by or under sanction of the usurpi (sec. 7). It also provided that if the conv called "refuse to re-establish the State governm conditions aforesaid, the provisional governor sh it dissolved," and whenever the President "shal son to believe" that there is "a sufficient number ple of the State entitled to vote under this act,' re-establish the State government on these con should direct the said governor to call another c (sec. 9). 13 Stat. U. S. 745. The bill gave the to all resident white citizens of full age who sh the oath of allegiance prescribed by Act of C July 2, 1862 (sec. 4).

For the reason above stated it is immaterial into the views of the nature of the Union hel Johnson as exhibited by his public course in ref State Reconstruction. His political doctrine m not have been irreconcilable, either with the acti predecessor, or with the policy which prevailed in as the resulting force from a variety of conflicting

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It is enough that the political course actually followed in the Reconstruction measures was supposed, at the time, by Mr. Johnson, and by all parties, to be contradictory to those political principles by which he, as President, directed his efforts.[1]

It might, perhaps, have been reasonable to expect that some more or less clear explanation of the political status of a State, as affected by the Rebellion, would have been given in the three Acts of Congress which constitute the so-called Reconstruction measures; or, at least, in some judicial decisions affirming their validity. It would seem, however, to be still an open question whether these measures were in harmony with our political faiths on the theory, that the States in their several corporate capacities were to be treated as political persons required to submit to all the consequences of defeat on "wager of battle," or under the view that, as States, they were claimants of the Constitutional guaranty for a republican government, of which they had been deprived by forcible usurpation; which guaranty was ingeniously realized by organizing, under military coercion, an electoral machinery driven by the votes of the emancipated slaves; the States appearing in the attitude of political repentance by exercise of inherent autonomy. There is little to be learned in regard to the theoretic status of the States affected by them from

[1] In fact there was very little difference in the matter of theory between these bitter opponents. In the preamble of his Proclamation of April 2, 1866, Mr. Johnson's language was: "*Whereas*, &c. it is the manifest determination of the American people that no State, of its own will, has the right or power to go out of, or separate from, the American Union, and that, therefore, each State ought to remain, and constitute an integral portion of the United States . . . *and whereas*, the Constitution of the United States provides for constituent communities only as States, and not as Territories, dependencies, provinces, and protectorates." 14 U. S. Stat. 39th Congress, App. ii. It was eighteen months after this that Chief Justice Chase said: — "The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States." *Ante*, p. 12. In the Reconstruction legislation the States are carefully designated as States.

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language of the three Acts of Congress whicl
the so-called Reconstruction legislation; all
President Johnson's objections. But in polit
where, "action speaks louder than words."

The first of these is that of March 2, 1867,
act for the more efficient government of the R
14 U. S. Stat. 428; of which Sec. 1 declares "
legal State government, or adequate protection
property, now exists in the rebel States of Vi
and whereas, it is necessary that peace and
should be enforced in said States until loyal a
can State governments can be legally establishe

Similar expressions occur in the supplement
March 23, and July 19, 1867. 15 U. S. Stat. 2,

The first of these Acts provided that the s
States" shall be divided into military districts,
subject to the military authority of the United
(Sec. 1).

The Act differs from the bill of 1864 (*ante*,
not directing the calling of a convention by
sional governor, but enacting that, —

> "When the people of any one of the said rebel
> have formed a constitution of government in conform
> Constitution of the United States in all respects, frame
> vention of delegates selected by the male citizens of
> twenty-one years old and upward, of whatever race, c
> vious condition . . . and when such constitution shall
> the elective franchise shall be enjoyed by all such pers
> the qualifications herein stated for electors of delegates,

And that, when such constitution shall have
proved by Congress, and when, —

[1] This Act is cited by Mr. Justice Grier as one ground fo
his dissenting opinion, that Texas was not a State in the Unio
in question. See *ante*, p. 16, Texas *v.* White.

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"Said State, by a vote of its legislature elected under said constitution shall have adopted the amendment to the Constitution of the United States, proposed by the 39th Congress, and known as Article fourteen, and when said Article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress,[1] and senators and representatives shall be admitted therefrom, on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act [relating to military government] shall be inoperative in said State." Sec. 5.

In conclusion it is enacted, —

"That until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same." Sec. 6.

The two supplementary Acts consist almost entirely in the detailed provisions for conducting the elections in view of calling the conventions. In the first section of the last of these it is declared to have been —

"The intent of the two preceding Acts that the governments then existing in the rebel States of Virginia, &c. . . . were not legal governments, and that, thereafter, said governments, if continued were to be continued subject in all respects to the military commander of the respective districts, and to the authority of Congress."

With these Acts, as equally important, in indicating the political status, may be noticed the Resolution passed, over the President's objections, July 20, 1868, entitled

[1] In this clause it is clearly supposed that the State shall be in existence when this is declared. White *v.* Hart, *ante*, pp. 19, 21. Mr. Justice Swayne cites this as showing that "the political department of the government" had regarded the State as having existed during the Rebellion. But why are not the previous provisions, here cited, equally important in that respect? Do *they* equally show that the State remained a State?

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Resolution excluding from the Electoral Colleg States lately in Rebellion, which shall not have bee ized. 15 U. S. Stat. 257. It reads, however, " of the States whose inhabitants were lately in &c.[1] .

The report made June 8, 1866, by the majo joint committee on Reconstruction,[2] as being authoritative declaration of principles supposec been afterwards carried out in political action, i ment which, either for good or evil, will proba garded as one of the most important in the histo country.

For this reason some paragraphs, bearing mo on the position and relations of States in the U here cited.

In this report it is said: —

[*a*] "A claim for the immediate admission of senato resentatives from the so-called Confederate States has b which seems to your committee, not to be founded either or in law, and which cannot be passed without comment. a few words, it amounts to this: That inasmuch as the la gent States had no legal right to separate themselve Union, they still retain their positions as States, and co the people have a right to immediate representation i without the imposition of any conditions whatever" . . .

After briefly reciting the civil and military tra

[1] In connection with all the Reconstruction legislation of Co be remembered also the resolutions of the House of Representati 22, 1861, denying "any purpose of conquest or subjugation," an that the war was waged "to preserve the Union with all the dig ity, and rights of the several States unimpaired, and that as so objects are accomplished the war ought to cease." House Journ 37th Congress, p. 124, and citation of it in President Johnson's tion of Aug. 20, 1866, 14 U. S. Stat. App. i.

[2] Report No. 30; being 2d vol. House Reports of Select Co 1st Session 39th Congress.

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on the part of the Rebellion, and its final suppression by military force alone, it is said, —

[*b*] "It cannot, we think, be denied by any one, having a tolerable acquaintance with public law, that the war thus waged was a civil war of the greatest magnitude. The people waging it were necessarily subject to all the rules which, by the law of nations, control a contest of that character, and to all the legitimate consequences following it. One of those consequences was that within the limits prescribed by humanity, the conquered rebels were at the mercy of the conquerors. That a government thus outraged had a most perfect right to exact indemnity for the injuries done, and security against the recurrence of such outrages in the future would seem too clear for dispute. What the nature of that security should be, what proof should be required of a return to allegiance, what time should elapse before a people thus demoralized should be restored in full to the enjoyment of political rights and privileges, are questions for the law-making power to decide, and that decision must depend on grave considerations of the public safety, and the general welfare.

[*c*] "It is moreover contended, and with apparent gravity, that from the peculiar nature and character of our government no such right on the part of the conqueror can exist; that from the moment when rebellion lays down its arms, and actual hostilities cease, all political rights of rebellious communities are at once restored; that because the people of a State of the Union were once an organized community within the Union, they necessarily so remain, and their right to be represented in Congress, at any and all times, and to participate in the government of the country under all circumstances, admits of neither question nor dispute. If this," &c.

[*d*] "Your committee do not deem it either necessary or proper to discuss the question whether the late Confederate States are still States of this Union, or can ever be otherwise. Granting[1] this profitless abstraction about which so many words have been wasted, it by no means follows that the people of those States may not

[1] From the context it must be inferred that the committee granted to the so-called conservatives that the States were still States in the Union, and could not be otherwise.

Of interest in connection with the decisions already cited and with this

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place themselves in a condition to abrogate the pov ileges incident to a State of the Union, and deprive all pretence of right to exercise those powers and en ileges. A State within the Union has obligations to member of the Union. It must submit to federal la federal authority. It must have a government reput under, and by which, it is connected with the genera and through which it can discharge its obligations than idle, it is a mockery, to contend that a people wh off their allegiance, destroyed the local government their States to the Union as members thereof, defiec refused to execute its laws, and abrogated every pi gave them political rights within the Union, still r all, the perfect and entire right to resume, at their pleasure, all their privileges within the Union, and participate in its government and to control the c affairs. To admit such a principle for one moment declare that treason is always master, and loyalty a bl a principle is void by its very nature and essence, bec tent with the theory of government and fatal to its ve

report, is the language of Judge Nelson two years later, Ju *Egan*, 5 Blatchford, 328: "For aught that appears, the civil the State of South Carolina were in the full exercise of thei tions at the time of this trial, [by court martial, Nov. 20, 186 by the suppression of the rebellion, some seven months prev the revival of the laws and the reorganization of the State (obedience to, and in conformity with, its constitutional duties Union. Indeed, long previous to this, a Provisional Governc pointed by the President, who is commander-in-chief of the a of the United States (and whose will, under martial law, const rule of action), for the special purpose of changing the e things and restoring civil government over the people. In this appointment a new Constitution had been formed, a G Legislature had been elected under it, and the State was in ment, or was entitled to the full enjoyment, of all her consti and privileges. The Constitution and laws of the United Stat by acknowledged and obeyed, and were as authoritative and the people of the State, as in any other portion of the country moment the rebellion was suppressed, and the government gr was subverted, the ancient possession, authority, and laws res customed away, subject only to the new reorganization or th of proper officers to give them operation and effect."

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[*e*] "On the contrary, we assert that no portion of the people of this country, whether in State or Territory, have the right, while remaining on its soil, to withdraw from or reject the authority of the United States. They must obey its laws as paramount and acknowledge its jurisdiction. They have no right to secede; and while they can destroy their State governments and place themselves beyond the pale of the Union, so far as the exercise of State privileges is concerned, they cannot escape the obligations imposed upon them by the Constitution and the laws, nor impair the exercise of national authority. The Constitution, it will be observed, does not act upon States, as such, but upon the people; while, therefore, the people cannot escape its authority, the States may, through the act of their people, cease to exist in an organized form, and thus dissolve their political relations with the United States."

After some notice of the question as affected by the principle "that taxation should be only with the consent of the taxed, through their own representatives," it is said further in the report, —

[*f*] "While thus exposing fallacies which, as your committee believe, are resorted to for the purpose of misleading the people, and distracting their attention from the questions at issue, we freely admit that such a condition of things should be brought, if possible, to a speedy determination. It is most desirable that the Union of all the States should become perfect, consistent with the peace and welfare of the nation; that all these States should become fully represented in the national councils, and take their share in the legislation of the country" . . . &c.

The committee proceed to notice the question of placing "the qualifications for voters in a State within the power of Congress," the doubts as to the existence of the power, and "whether the States would consent to surrender a power they had always exercised, and to which they were attached," and the proposition for modifying that power, as now expressed in the Fifteenth Amendment. After some discussion of President Johnson's methods of Reconstruction, it is further said, —

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[*g*] "If, as the President assumes, these insurrec were, at the close of the war, wholly without State g would seem that, before being admitted to partici direction of public affairs, such governments should b ganized. Long usage has established, and numerou pointed out, the mode in which this should be done. to frame a form of government should be assembled tent authority. Ordinarily, this authority emanates fi but, under the peculiar circumstances, your committ posed to criticise the President's action in assumi exercised by him in this regard." . . .

Further on it is remarked in the same repor

[*h*] "It would undoubtedly be competent for Con all formalities, and to admit these Confederate State tation at once, trusting that time and experience things right."

In concluding, the committee "propose tc briefly as possible, the general facts and prin cable to all the States recently in rebellion."

These are classed under ten paragraphs, all important in bearing on the general question be fully cited here.

In the first paragraph, after stating the initi the rebellion, it is said: —

"From the time these Confederate States thus representation in Congress and levied war agains States, the great mass of their people became and w rebels, traitors, and all of them assumed and occupie legal, and practical relation of enemies of the United position is established by acts of Congress and jud and is recognized repeatedly by the President in pu tions, documents, and speeches."

In the second paragraph: —

"The States thus confederated prosecuted their w United States to final arbitrament, and did not cease armies were . . . every vestige of State and Confe

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ment obliterated, their territory overrun and occupied by the federal armies, and their people reduced to the condition of enemies conquered in war, entitled only by public law to such rights, privileges, and conditions as might be vouchsafed by the conqueror. This position is also established by judicial decisions, and is recognized by the President in public proclamations, documents, and speeches."

Under the third paragraph: —

"Having voluntarily deprived themselves of representation in Congress for the criminal purpose of destroying the federal Union, and having reduced themselves, by the act of levying war, to the condition of public enemies, they have no right to complain of temporary exclusion from Congress: but, on the contrary, having voluntarily renounced the right to representation, and disqualified themselves by crime from participating in the government, the burden now rests upon them, before claiming to be reinstated in their former condition, to show that they are qualified to resume federal relations. In order to do this they must prove that they have established, with the consent of the people, republican forms of government in harmony with the Constitution and laws of the United States, that all hostile purposes have ceased, and should give adequate guarantees against future treason and rebellion, — guarantees which shall prove satisfactory to the government against which they rebelled and by whose arms they were subdued."

Under the fourth paragraph: —

"Having, by this treasonable withdrawal from Congress, and by flagrant rebellion and war, forfeited all civil and political rights and privileges under the federal constitution, they can only be restored thereto by the permission and authority of that constitutional power against which they rebelled and by which they were subdued."

Under the fifth paragraph: —

"These rebellious enemies were conquered by the people of the United States, acting through all the co-ordinate branches of the government and not by the executive department alone."

The remainder of this paragraph and the five following relate mainly to the contest then going on between Presi-

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dent Johnson and Congress, which it is not necessary to consider here.

Finally, it is remarked: —

"Before closing this report, your committee beg leave to state that the specific recommendations submitted by them are the result of mutual concession after long and careful comparison of conflicting opinions. Upon a question of such magnitude, infinitely important as it is to the future of the republic, it was not to be expected that all should think alike. . . ."[1]

In reading these extracts it should be remembered that not only were the "specific recommendations submitted," that is, the amendment and legislation proposed, but the Report itself was, also, the result of more or less compromise from a variety of more or less discordant opinions; and also that it was composed with special reference to a view of the nature of the Union supposed to be antagonistic to any accepted by any member of the majority of the committee; which view had been supported by Mr. Johnson, in his messages and proclamations, and was further illustrated and defended by the minority of the same committee.

The report made by this minority, June 20, 1866, which also was printed with the Reports of committees of this Congress,[2] may contain propositions of much truth and arguments of great force, but as it was *not* the basis of any political action of the government, this is not the place to cite from it; though some of its positions may be noticed further on in these pages.

[1] The great diversity of opinion prevailing among members of the House at this time may be judged by the many various Resolutions in the Journals of the 1st and 2d session of the 39th Congress relating to the general subject of reconstruction. See also Macpherson's Hist., p. 816, and Wilson's Hist. of Reconstruction.

[2] Report No. 30, Part 2.

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CHAPTER II.

THE SUBJECT CONTINUED BY EXAMINATION OF THE LANGUAGE OF THE SEVERAL DEPARTMENTS OF THE GOVERNMENT IN REFERENCE TO QUESTIONS OF BELLIGERENCY AND TREASON. — A CHAOS OF DOCTRINE.

THERE may be differences of opinion as to that capacity of the executive to institute a blockade, and of the judiciary to recognize it, as arising from an existing state of war involving the exercise of belligerent rights, which was asserted by the majority in the Prize Cases, 2 Black, 667, in which instance the minority referred the power to Congress. But the settlement of this doubt is not material to the inquiry, To whom did the court attribute belligerency when recognized?

The eleven Southern *States* were declared the party belligerent, in those cases at the December Term, 1862, in the majority opinion delivered by Mr. Justice Grier, containing references to the States, such as these: "Hence, in organizing this rebellion they have *acted as States* [Ital. in report] claiming to be sovereign." 2 Black, 669. "A civil war, such as that now waged between the Northern and the Southern States." Ib. 673.[1]

[1] It would appear that the division of opinion in this case was, essentially, as to the nature of a State in the Union. Mr. Justice Grier's conception of such a State involved recognition of the capacity for international war, independently of the degree of military power actually exhibited in operation. See *ante*, p. 17, and note to the same judge's dissenting opinion, in Texas *v.* White. This had been the position taken by Judge Sprague in the Amy Warwick, 2 Sprague's Decisions, 143, 14 Monthly Law Reporter, 498, which was one of these Prize Cases. See *post*, p. 166. But it is not certain that the other justices concurring in the opinion delivered by Mr. Justice Grier in the Prize Cases took the same view of the State's capacity. They may have considered the insurgents personally as constituting a belligerent party as known to the law of public war.

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In the minority opinion, by Mr. Justice Taney, Chief Justice, and Catron and Clifl curring, the recognition of the conditions of l limited to the time after the Act of Congre 1861, with the distinction that, before that d gents "personally," or independently of rec cal organizations and territorial boundaries. considered, by the executive and judiciary, as in a *war;* as defined by the law of nations; authorize the President alone to institute a l

But the discrimination of *the States* as the in the war when so recognized, is made as di opinion of the minority as in that of the majc

Mr. Justice Nelson said, —

"This Act of Congress, we think, recognized a st between this government and the Confederate Sta territorial." 2 Black, 695. "We agree, therefor of July 13, 1861, recognized a state of civil war b ernment and the people of the States described in tion." Ib. 696. "I am compelled to the conclus war existed between this government and the States till recognized by the Act of Congress of July 13, 1

It may be supposed that as to all cases whi the Act of Congress of July 13, 1861, the c the discrimination of the party belligerent as by its own judgment or by the authority of

[1] The distinction intended by Judge Nelson appears cl ing Mauran *v.* Ins. Co., 6 Wall. 1, in which, also, he delive the court, sustaining the claim against the insurers for lo seizure on the lower Mississippi, May 17, 1861; that is, be sional recognition of war, as the act of "a *quasi*-governmer *de facto*," — "the ruling power of the country at that tim and Swayne, J., dissented; but their reasons are not state

[2] Could it be said on the authority of these cases, that state of war may be within the competency of the judiciar tion, while the determination of the party belligerent is petency, as being a political question?

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and executive departments. The terms "Rebel States," "insurrectionary States," "States in rebellion," "rebellious States," are in ordinary use,[1] and there is no further attempt to discriminate an insurgent population, or a *de facto* military organization, as the party belligerent, in distinction from States with recognized political capacity to wage war: unless, perhaps, exceptions may occur, when speaking of the acts of the Confederate government. An illustration of this may be found in the language of the court in Hickman *v.* Jones, 9 Wall. 197, a case founded on a claim for damages by reason of a prosecution in a Confederate District Court, for treason against the Confederacy. In the opinion delivered by Mr. Justice Swayne, ib. 200, it is said: —

"The rebellion, out of which the war grew, was without any legal sanction. In the eye of the law, it had the same properties as if it had been the insurrection of a county or smaller municipal territory against the State to which it belonged. The proportions and duration of the struggle did not affect its character. Nor was there a rebel government *de facto* in such a sense as to give legal efficacy to its acts. It was not recognized by the national, nor by any foreign government. It was not at any time in possession of the capital of the nation. It did not for a moment displace the rightful government. That government was always in existence, always in the regular discharge of its functions, and constantly exercising all its military power to put down the resistance to its authority in the insurrectionary States. The union of the States for all the purposes of the Constitution, is as perfect and indissoluble

[1] See, particularly, Texas *v.* White, 7 Wall. 700; Thornton *v.* Smith, 8 Wall. 1; The Legal Tender Cases, 12 Wall. 553; White *v.* Hart, 13 Wall. 651; Hamilton *v.* Dillon, 21 Wall. 86; United States *v.* Ins. Co., 22 Wall. 102; Mathews *v.* McStea, 1 Otto, 11. The cases arising under the Confiscation Acts, and particularly those sustaining the seizure of cotton, as a "species of property excepted, by its peculiar character, and by circumstances from the general rule of international law" (2 Wall. 204; 9 Wall. 540), were decided in the Supreme Court under a stringent application of the idea of treating the States and their inhabitants as alien enemy. See *post*, under the question of treason.

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as the union of the integral parts of the States nothing but revolutionary violence can, in either ties which hold the parts together. For the sake tain belligerent rights were conceded to the insurge the recognition did not extend to the pretended go Confederacy. The intercourse was confined to its ties. In no instance was their intercourse other character."

In the preface to his edition of a selectio Decisions, Mr. B. T. Johnson quotes from h at the meeting of the Richmond bar, on the decease of the Chief Justice: "His decisi followed by the Supreme Court, whose adj preceded, and we are indebted to him for th law adopted and enforced by that tribunal. stated of the Chief Justice, in the same conn

"Rising at once to the greatness of the occasi and declared the principles of public law which c cumstances, and from them marked out an applica ated as amnesty, peace, and security for life and p case of Keppell's Administrator *v.* The Petersb announced that the contest through which we civil war, and that all the consequences of gene from it. He declared that the acts of the govern to the Federal government, &c. . . . Following beneficent declarations of legal principles controll the late Confederate States, &c. . . . The existe governments *de facto* being granted, all their acts xiii., xiv.

The decision Mr. Johnson relies on, wa Adm'r *v.* Petersburg Railroad, May, 1868, first outgiving from him of the change whic in his mind since the case of Shortrid June, 1867. Preface iii. As I read these with that softening of expression which t

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they have undergone under the deceased judge's direction, there is no departure from the position in the earlier case, and it is not at all clear that the Chief Justice ever did more than recognize a *de facto* belligerent, without intending any particular recognition of the eleven States, in their political capacity as the parties, which appears to be the point made by General Johnson.

But this had been done by the court, following the action of Congress, long before. Indeed, Chief Justice Chase seems always to have avoided the recognition of the States as the party belligerent. In United States *v.* Morrison, June Term, 1869, Johnson's Chase's Decisions, 525, in charge to the jury, he said, "The national government conceded belligerent rights to the armies of the insurgent States during the late civil war."

Chief Justice Chase seems to have accepted the customs of international war as applicable in governing these States by the military power for a certain time, see Merchant's Bank *v.* Union Bank, 22 Wall. 293 (citing the Grape-shot, 9 Wall. 129): but without any distinct recognition of those States as being politically belligerent powers; and that this was his view may appear by comparing the dissenting opinion in that case by Field, J. He also supported an extreme application of belligerent capacity, during the war, in the cotton-seizure cases (*ante*, p. 51, *n.*). But whether he adopted the conquest theory, to the extent of Judge Swayne's opinion in White *v.* Hart, seems very doubtful.

To appreciate more accurately the position of the judiciary on a question of this nature, which could hardly await the lingering approach of legal procedure, we may properly compare the contemporary language of the executive and legislative. The same comparison may throw much light on the origin of the political doctrine as to State existence which has been set forth as legal judgment

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in Texas *v.* White, or in later cases supposed to be in harmony with it.

In the earliest stages of the rebellion and civil war, there was necessarily a doubt how far any act of violence, by sea or land, by persons claiming to have authority from the States, as political organizations, would be recognized by any government as beyond the jurisdiction of ordinary criminal procedure; that is, would be taken by the government of the United States or by foreign nations for the act of some belligerent power.[1]

Mr. Lincoln, in a proclamation, April 19, 1861, 12 Stat. U. S. 1262, 1 Reb. Rec. 78, Macpherson's Pol. Hist. of the Rebellion, 149, declared such acts at sea "under the pretended authority of the said States" punishable as piracy. But the fact, that this position was abandoned, would settle nothing as to the question whether the belligerent recognized was the States, as politically capable of war, or was an insurrectionary military organization, as a *de facto* belligerent power.

President Lincoln's judgment seems to have wavered between a first conception of the rebellion, as the act of individual inhabitants of States regarded only as certain geographical districts, and a later one, more in harmony, perhaps, with the action of the other departments and with popular ideas, in which the movement was attributed to *the States* as political bodies.

Mr. Lincoln's first proclamation, April 15, 1861, 12 U. S. Stat., 1258, I. Reb. Rec., 64, Macph. Hist., 114, called out the militia, "To suppress unlawful combinations too pow-

[1] This doubt appears in Mr. Lincoln's earlier messages. The action, or want of action, by Mr. Lincoln's predecessor, was derived from a directly opposite view of duty, because, with his theory of the Union, he could regard the States as each politically capable of waging war, and therefore could not hold personally responsible individual citizens acting, as he supposed, under their authority. See President Buchanan's Last Message, Dec. 4, 1860, with the opinion by Attorney-General Black; Macpherson's Pol. Hist. 49, 51.

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erful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the magistrates by law." That of April 19, 1861, 12 U. S. Stat., 1258, I. Reb. Rec., 78, Macpherson, 149, which is that declaring the blockade of certain ports, recites, "Whereas an insurrection against the Government of the United States has broken out and yet exists in the States of," &c., "and a combination of persons engaged in such insurrection have," &c. That of August 16, 1861, 12 U. S. Stat., 1262, II. Reb. Rec. 532, Macpherson, 149, prohibiting commercial intercourse with certain States, recites, "Whereas such insurrection has since broken out and yet exists in the States of Virginia," &c., "and whereas the insurgents in all the said States claim to act under the authority thereof, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which such combinations exist, nor has such insurrection been suppressed in said States."

But that of July 1, 1862, 12 U. S. Stat., 1266, V. Reb. Rec. 296, Macpherson, 150, declaring that certain "States and parts of States are now in insurrection and rebellion," follows the phraseology of the Act of Congress of June 7, 1862, 13 U. S. Stat. 730. His proclamation of June 15, 1863, 13 U. S. Stat. 733, VII. Reb. Rec. 309, recites, "Whereas armed insurrectionary combinations now existing in several of the States are threatening," &c. That of December 8, 1863, 13 U. S. Stat. 737, VIII. Reb. Rec. 295, Macpherson, 147, reciting, "Whereas a rebellion exists, whereby the loyal State governments of several States have for a long time been subverted," &c. has already been noticed.[1]

Mr. Lincoln's later proclamations always designate *the*

[1] *Ante*, p. 35.

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inhabitants as distinguished from *the States* chargeable. In that of July 8, 1864, referr herein already described,[1] which had failed to nature, he speaks of it as containing, "amon a plan for restoring the States in rebellion t practical relation in the Union." But he using the same expression when giving his o

The internal public law, or constitution o is matter of concern and recognition to foreig so far as they may be obliged to notice the it rests. The aspect in which a nation ma sent itself, at any particular time, to the rest is therefore a material element in the establ own conscious existence, as being the reflect assertion of its internal structure.

The position occupied by a country in it relations, or as exhibited in its international more directly connected with the executive other department. As incidental, therefor coln's administration, it is here proper t the British government, by the Queen's p neutrality, May 13, 1861, reciting "whe have unhappily commenced between the the United States and certain States calling Confederate States of America," recognize state of war, but *the States* as individual their political nature, of carrying on a war; policy was "immediately followed by simil or silent acquiescence, by other nations." Prize Cases, 2 Black, 669.

The course taken by the British gover juncture, excited much feeling at the North

[1] *Ante*, p. 37.

[2] Much of this feeling was based on a presumed clai against "a slaveholder's rebellion."

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as I have been able to make out, it was chiefly on the ground that the action was precipitate; as having been taken irrespectively of any knowledge of the actual military power of the southern forces. This circumstance, if admitted, showed more clearly the idea of the political existence of the States in the Union which was accepted in England.[1]

But I am not aware that in any exception taken at the time, the recognition of *the States* as the parties to the war was declared more objectionable than recognition of the insurgents as a belligerent party, in consequence of their actual military power.

President Johnson, in his proclamation of May 10, 1865, 13 U. S. Stat., 757, recites, "Whereas the President of the United States [Mr. Lincoln] by his proclamation of April 19, 1861, did declare certain States therein mentioned, in insurrection against the Government of the United States, and whereas armed resistance to the authority of the Government in the said insurrectionary States," &c. It is not in the least probable that Mr. Johnson had any intention to misstate his predecessor's views. So it would seem that he had not understood Mr. Lincoln's language, in that instance, as indicating his intention to avoid recognition of

[1] The wording of Lord John Russell's dispatch, May 6, 1861, to Lord Lyons, is, — "a civil war which has broken out between the several States of the late Union. For the present, at least, those States have separated into distinct confederacies, and, as such, are carrying on war against each other." Bemis, On the Hasty Recognition of Rebel Belligerency, pp. 12, 13. In the letter to the London Times, March 18, 1861, signed *Historicus*, it is said, ib. 51, "The Confederate States had belligerent rights by the mere fact of being at war. They acquired these rights immediately that a state of hostilities arose by the North going to war with them, or their going to war with the North. Their title to belligerent rights was derived not from the concession of any foreign power, but from the established code of the law of nations. . . . They went to war of their own will and pleasure, and from the moment they did so, the enjoyment of belligerent rights accrued to them as a matter of course."

If there was weakness in the position of the English government, in a diplomatic relation, it was from not resting plainly on this single basis.

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the States as the parties chargeable with rebellion and treason. In his proclamation of August 20, 1866, 14 U. S. Stat. (39th Cong.) append. iv., he recited the series of proclamations by Mr. Lincoln, from that of April 19, 1861, to that of September 15, 1863, and also refers to resolutions of the House of Representatives of July 22 and 25, 1861, as speaking of "a civil war forced upon the country by the disunionists of the southern States now in revolt against the constitutional government." But he does not appear to have noticed their language as discriminating between *the States* and citizens or inhabitants, as the parties in rebellion.

A variation of language corresponding with that in the proclamations of the executive may be traceable in Acts of Congress from 1861 to 1866.

In that of July 13, 1861, entitled *An Act further to provide for the collection of duties on imports and for other purposes*, 12 U. S. Stat., p. 255, it would seem that special care had been taken to avoid mention of *the States* as parties in rebellion.[1] In the first section it reads "by reason of unlawful combinations of persons in opposition to the United States become impracticable," &c. In § 5: "When said insurgents claim to act under the authority of any State or States and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States . . . it shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States."

[1] But Mr. Justice Nelson in his dissenting opinion in the Prize cases, 2 Black, 698, (December term, 1862, nearly one year and a half later) referred to this act as recognizing war between the government and "States in insurrection." Similar reference to the tenor of this act, alone or in connection with later acts, on matters relating to the rebellion, may be found in judicial opinions delivered in later cases.

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Popular recognition of States as the Parties.

Nor are the States designated as the parties in the act of July 29, 1861, 12 U. S. Stat. p. 281, *An Act to provide for the suppression of Rebellion and Resistance to the Laws of the United States;* nor in that of July 31, 1861, 12 U. S. Stat., p. 283, *For giving arms to loyal citizens of the States of which the inhabitants now are or hereafter may be in rebellion*, &c.; nor in that of July 17, 1862, 12 U. S. Stat., p. 589, *An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes.* And such, generally speaking, is the tenor of all later acts during Mr. Lincoln's administration; except that of March 12, 1863, 12 U. S. Stat., p. 820, entitled *An Act to provide for the collection of abandoned property, and for the prevention of fraud in insurrectionary districts within the United States;* where reference is made to "insurrectionary districts," and to "any State or Territory, or any portion of any State or Territory, of the United States designated as in insurrection against," &c., &c., "by the President's proclamation of July 1, 1862; and excepting also the supplementary act of July 2, 1864, 13 U. S. Stat., 375, where the terms "insurrectionary States" and "States in insurrection" are for the first time employed.

Coming to expressions used by Congress during Mr. Johnson's presidential term, we may notice the three Acts commonly called the Reconstruction Acts, *ante*, p. 40, in each of which the phrase "rebel States of Virginia," &c., occurs.

Indeed, it may be stated broadly, that the people of the Northern States, without distinction of party, from the beginning of the rebellion to the present, have shown, in every form in which public and general opinion can be expressed, that they have regarded the eleven Southern States as the parties in the war and as liable, *as States*, — political members of the Union, — to the consequences of their action.

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This view is, of course, that which the pe eleven States have always maintained; while it, neither the government of the United S people of the Northern States, nor the par especially sustained the administration, du and afterwards, have thought themselves blame, or to criticism from any quarter, for in denouncing individual persons, citizens of as chargeable with treason as a legal crime.

Whatever degree of doubt might have pr outbreak of the insurrection, rebellion, or ci the duty of the private citizen, in the suppo his own State and section should attempt sec probably, believed universally that, if the g the United States should be re-established i there would then appear some clear expositi of treason; applicable in the future, at least.

In the United States *v.* Greathouse, 2 A Rep. 380, 10th Circuit, California, October defendant, a citizen of Kentucky, with anot the same State, and with a British subject, under the Act of July 17, 1862, 12 U. S. S treason, by "levying war against the Unite giving aid and comfort to their enemies, equipped, in the port of San Francisco, and cruise with, a vessel carrying a letter of Mr. Davis, as President of the Confederacy.

On the trial of the indictment before Judg Hoffman, Judge Field said in his charge to tl

"As matter of policy and humanity, the gov United States has treated the citizens of the so-cal States, taken in open hostilities, as prisoners of wa exempted them from trial for violation of its munici the courts have no such dispensing power; they c the laws as they find them upon the statute book

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treat any new government as having authority to issue commissions or letters of marque, which will afford protection to its citizens, until the legislative and executive departments have recognized its existence. The judiciary follows the political department of the government in these particulars.[1] By that department, the rules of war have been applied only in special cases; and, notwithstanding the application, Congress has legislated, in numerous instances, for the punishment of all parties engaged in, or rendering assistance in any way to, the existing rebellion. The law under which the defendants are indicted was passed after captives in war had been treated and exchanged as prisoners of war in numerous instances.

"But even if full belligerent rights had been conceded to the Confederate States, such rights could not be invoked for the protection of persons entering within the limits of States which have never seceded, and secretly getting up hostile expeditions against our government, and its authority and laws. The local and temporary allegiance, which every one — citizen or alien — owes to the government under which he at the time lives, is sufficient to subject him to the penalties of treason."

It will be noticed that, in this instance, there was no defendant charged with treason who was in the situation, as a citizen of one of the States of the Confederacy, to plead his relation to such State in denial of liability under this indictment. The case was such as might occur during a war with any foreign nation.[2]

[1] This case would be important mainly as it might indicate some necessary limitation to that recognition of the rebel belligerency which was accorded by the government of the United States, and how it differed, intrinsically, from that which was declared by the British government, *ante*, p. 56. But, in strictness, this case would not be a precedent, on the question of treason as raised on capture of citizens of any of the States of the Confederacy on a privateer which might have issued from a port of the Confederacy, or from a foreign port, under such a commission.

[2] A belligerent being recognized, the courts are obliged to determine the application of the customary law of international warfare. In Ford *v.* Surget, 7 Otto, 97 U. S. 594, the defendant, a citizen of Louisiana, who had destroyed the plaintiff's cotton by order of the Confederate military authorities, was held exempt from responsibility. The opinion of the court, by Mr. Justice Harlan, and a separate opinion by Mr. Justice Clifford, concurring in the judgment, are each of great historical interest, as giving

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More material to the questions raised by t
is the following portion of Judge Field's char

"The term 'enemies,' as used in the second claus
its settled meaning at the time the Constitution wa
plies only to the subjects of a foreign power in a sta
tility with us. It does not embrace rebels in insu
their own government. An enemy is always th
foreign power who owes no allegiance to our gover
try. We may omit, therefore, all consideration
clause in the constitutional definition of treason.
defendants they must be brought within the first cla
nition. They must be shown to have committed act
to a levying war against the United States."

There are certain cases in the reports w
may not, be generally supposed to show that
treason against the United States had been ju
upon persons, citizens of some State of the
These are the cases arising under several Ac
passed during the war and generally known
tion Acts, which are mainly that of Augus
U. S. Stat. 319, entitled *An Act to confiscate
for insurrectionary purposes*, and the Acts
1862, and of March 12, 1863, already named
and the Act of July 2, 1864, 13 U. S. Stat. 375,
*Act in addition to the several Acts concerning
tercourse between loyal and insurrectionary
provide for the collection of captured and ab
erty, and for the prevention of frauds in Stat
insurrection*," the third section of which ext

general reviews of the decisions on the effect of the stat
especially, as they may indicate a distinction, which is di
of the earlier opinions, in identifying the party or perso
ligerent capacity was attributed. One opinion seems to fi
de facto military organization, while the other appears to re
States, in their political capacity, as the belligerent.

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section of the Act of March 12, 1863, to include the descriptions of property mentioned in the Act of July 17, 1862.[1]

The case, Union Ins. Co. *v.* United States, 6 Wall. 759, arose on the seizure under the Act of 1861, of real estate, located in New Orleans, and its condemnation in the District Court on proceedings following the practice in admiralty,[2] for having been leased to parties who established on the premises a manufactory of arms for the rebel government."

In the case of Armstrong's Foundry, 6 Wall. 766, the property, real estate in New Orleans, had, under the same statute, been seized as forfeited to the United States, by reason of having been used, under lease from the owner, in aid of the rebellion. Armstrong, as claimant in the District Court, "pleaded the amnesty offered by President Lincoln, and his acceptance of it and compliance with the terms." The plea was rejected, and a decree of condemnation was rendered. On the appeal to the Supreme Court, Mr. Chief Justice Chase delivered the opinion, and said: —

"It was insisted, in argument, that the pardon pleaded by the appellant cannot avail to relieve him from the forfeiture of the property seized, because the liability to seizure arose, under the statute, from the mode in which the property was employed, and was not to be regarded as a penal consequence of the act of the owner. We are unable to concur in this view. We think it clear that the

[1] The same section provides, "that all property, real and personal, described in the Acts to which this is an addition, shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom, and engaged, either in arms or otherwise, in aiding or encouraging the rebellion."

[2] In this instance the case was remanded by the Supreme Court to the District Court for a new trial; on the ground that, the property seized having been real estate, the proceedings, on the new trial, must be conformed in respect to trial by jury and exceptions to evidence, to the course of proceeding by information, on the common law side of the court in cases of seizure upon land. 6 Wall. 766; also Ib. 769, and 8 Wall. 508.

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statute regarded the consent of the owner to the e property in aid of the rebellion as an offence, anc ure as a penalty. The general pardon of Arm relieved him of so much of the penalty as accrue States." Ib. 769.

Mr. Justice Miller dissented, without opinion.

The majority of the cases of the same cl determined under the Act of July 17, 1862

In the case of Mrs. Alexander's cotto the property had been seized in the sprin naval or military force, at her plantation r Red River, had been taken to Cairo, Ill., prize of war and as matter of maritime cap

[1] In a note to this case, Ib. 770, the same doctrine is erned other cases. The distinction from cases of maritin out, where the proclamation did not restore the owne "Gray Jacket," 5 Wall. 342, 348.

[2] The title is given *ante*, p. 59. The first four sections ishment of treason against the United States, on being adj by death or by fine and imprisonment; enacting also the any, shall be declared and made free;" and for the pun engaging in any rebellion. In section 5 it is provided, " speedy termination of the present rebellion, it shall be t ident of the United States to cause the seizure of all the money, stocks, credits, and effects of the persons herein section, and apply and use the same and the proceeds t port of the army of the United States; that is to say persons, office-holders of the Confederate States, are sixthly, "any person who, owning property in any lo tory, or in the District of Columbia, shall hereafter and comfort to such rebellion." Sect. 6 makes it the du to "seize the property of persons who, being engaged i &c. Sect. 7 provides "and if said property . . . shall b longed to a person engaged in the rebellion, or who has fort thereto, the same shall be condemned as enemies' pr the property of the United States." An analysis of the Day *v.* Micou, 18 Wall. 156.

On the same date, was passed a joint resolution, 12 S planatory of this Act, which contains this clause: "No ment or proceedings under said Act be so construed as t of the real estate of the offender beyond his natural life

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cree of the District Court restored the property on her claim. In the Supreme Court the United States Attorney, on behalf of the captors, asked for the reversal of this decree and for the condemnation of the property as maritime prize. Ib. 418. The court reversed the decree of the District Court which had restored the property; but it denied the claim for prize, and directed the proceeds of the cotton to be paid into the national treasury, under the provisions of the Act of Congress.[1]

The opinion of the court, unanimous, it seems, was delivered by Mr. Chief Justice Chase. In this it is said:—

"This court cannot inquire into the personal character and dispositions of individual inhabitants of enemies' territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States, must be regarded as enemies until by action of the legislature and the executive,[2] or otherwise, that relation is thoroughly and permanently changed.... Being enemies' property, the cotton was liable to capture and confiscation by the adverse party.[3] It is true, this rule, as to property on land, has received very important qualifications, from usage, from the reasonings of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted to 'special cases

[1] In the opinion of the court, this is spoken of as a statute favorable to the enemies who come within its scope, the decree being "in order that the claimant, when the rebellion is suppressed, or she has been able to leave the rebel regions, may have the opportunity to bring her suit in the Court of Claims, and, on making the proof required by the Act, have the proper decree." (Ib. p. 423.) See also United States *v.* Padelford, 9 Wall. 543, and United States *v.* Klein, 13 Wall. 136; Haycroft *v.* The United States, 22 Wall. 81; the opinions also by Chase, C. J., in which the government is supposed to be made a trustee: so that when the owner whose property has been seized as *alien enemy's* should prove that he was *not a traitor*, or had been amnestied as rebel, its proceeds, deducting expenses, should be returned to him. In United States *v.* Klein, Miller and Bradley, JJ., dissented on this. See *post*.

[2] That is, apparently, of what in other cases is denominated "the political department" of the government. See *ante*, p. 19, and note.

[3] Citing Prize Cases, 2 Black, 687.

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dictated by the necessary operation of war,'[1] and general, 'the seizure of the private property of pa the sake of gain.'[2] The commanding general m what special cases its more stringent applicati by military emergencies; while considerations of p positive provisions of law, and the general spirit of indicate the cases in which its application may be to the property of non-combatant enemies.

"In the case before us, the capture seems to ha by the peculiar character of the property and by l well-known that cotton has constituted the chief rebels for means to purchase the munitions of war Rather than permit it to come into the possession troops, the rebel government has everywhere dev owned, to destruction.[3] . . . The rebels regard it as sinews of war; and no principle of equity or jus when the national occupation was itself precariou be spared from capture and allowed to remain, in drawal of the Union troops, an element of strengt

"And the capture was justified by legislation a lic policy. The act of Congress to confiscate pro surrectionary purposes, approved August 6, 1861, erty employed in aid of the rebellion with consent be lawful subject of prize and capture wherever f U. S. 319.) And it further provided by the act t rection, and for other purposes, approved July 1 that the property of persons who had aided the re not return to allegiance after the President's w seized and confiscated. It is in evidence that M a rebel enemy at the time of the enactment of th Alexander, being now a resident in enemy territo enemy, can have no standing in any court of the long as that relation shall exist.[4] Whatever mig effect of the amnesty had she removed to a loyal

[1] Cites 1 Kent, 92. [2] Cites

[3] See Ford *v.* Surget, 7 Otto, 595, 609; *ante*, p. 61, no

[4] In 2 Brightly's Digest (1869), 276, note to Insurre itants of States in rebellion against the government are t enemies, and as such disqualified from suing in the court

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the oath, it can have none on her relation as enemy voluntarily resumed by continued residence and interest." (Ib. 421.)

The same views were reaffirmed by Chief Justice Chase in opinions delivered for the court, in United States *v.* Padelford, 9 Wall. 531, and United States *v.* Klein, 13 Wall. 128, where the disposition of the property seized, as between the United States Treasury and the former owner was considered under the Act of 12 March, 1863, "The Captured and Abandoned Property" Act.

In United States *v.* Anderson, 9 Wall. 56, the unanimous opinion of the court was delivered by Mr. Justice Davis, who gave this view of the nature of that statute: [1]—

"During the progress of the war, it was expected that our forces in the field would capture property, and as the enemy retreated, that property would remain in the country without apparent ownership, which should be collected and disposed of. In this condition of things, Congress acted. While providing for the disposition of this captured and abandoned property, Congress recognized the status of the loyal Southern people, and distinguished between prop-

Bouneau *v.* Dinsmore, 24 Law Rep. 381. Nor can they appear as claimants in a case of prize. United States *v.* The Isaac Hammett, 4 West. L. Mo. 486; s. c. 10 Pitts. L. J. 97; United States *v.* The Allegheny, Ib. 276; United States *v.* 100 Barrels, &c., Law R. 785."

[1] In the first section of this act provision was made for "agents to receive and collect all abandoned or captured property in any State or territory, or any portion of any State or territory of the United States designated as in insurrection against the lawful government of the United States by the proclamation of the President of July 1, 1862. *Provided*, that such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war." In the third section, that "any person claiming to have been the owner of any such abandoned or captured property, may at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of the Court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of said proceeds, after deduction," &c.

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erty owned by them and property of the disloyal. quired to do this, for all the property obtained in t by proper proceedings, have been appropriated to t the war. But Congress did not think proper to spirit of liberality, it constituted the government much of this property as belonged to the faithfu ple," &c.

The earlier position, taken in Mrs. Alex as to the inability of the owner to appear a abandoned in later cases.[1]

In McVeigh *v.* United States, 11 Wall. tiff, who had held civil and military offices u federacy, and, apparently, taken no action on proclamation, appeared by counsel, and m property which had been libelled, and filed the District Court, on motion, the claim, a pearance were stricken from the files; the persons was taken, and a decree was render demnation and sale of the property. T affirmed in the Circuit Court, from which before the Supreme Court, on writ of error. court reversed the judgment of the District cause was "remanded to the Circuit Court, to proceed in it in conformity to law."

Mr. Justice Swayne, delivering the una of the court, said: —

[1] On p. 256, 11 Wall. the reporter notes that the fou ing; viz., Garnet *v.* United States, McVeigh *v.* San and Tyler *v.* Defrees, arose under the two acts of 18 known as the Confiscation Acts. Along with one or tw argued at the last term; but, after being taken into adv close of it, ordered to be reargued at this. They we very much together. In the first of them nothing rel was reached; the case going off on a point of jurisdi ment of none of them did the Chief Justice [Chase] o participate."

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"It is objected that McVeigh was incompetent to sue out this writ of error. His alleged criminality lies at the foundation of the proceeding. It was averred in the libel that he was the owner of the property described, and that he was guilty of the offences charged, which rendered it liable to forfeiture. The questions of his guilt and ownership were therefore fundamental in the case. . . The case is wholly unlike a proceeding purely *in rem*. . . . The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.[1]

"Whether the legal *status* of the plaintiff in error was, or was not, that of an alien enemy, is a point not necessary to be considered; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow." Ib. 267.

The case which follows in the volume, Miller *v.* United States, 11 Wall. 268, is the leading case on this aspect of the subject. The plaintiff in error, in this case, likewise, was an official in the civil and military service of the Confederates. His competency to sue out the writ was maintained on the principle of the last case. Ib. 293. In this case the decree of the District Court, confiscating certain stock held by the plaintiff in railways located in the Northern States, was affirmed by a majority of the court

[1] This very decided language, from a unanimous opinion of the court, was cited by Mr. Justice Field when delivering the opinion of the court in the later case of Windsor *v.* MacVeigh, 3 Otto, 93 U. S. 277, in which instance a majority of the justices again declared the invalidity of a condemnation of property as by default, after the claimant's appearance and answer had been stricken out in the District Court, on proceedings instituted under the Act of July 17, 1862. But in this case Justices Miller, Bradley, and Hunt dissented. Ib. 284.

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in a very full opinion by Mr. Justice Strong was said, Ib. 304: —

"It remains to consider the objection urged or plaintiff in error, that the acts of Congress, under v ceedings to confiscate the stock have been taken, ar by the Constitution, and that they are in conflict w provisions. The objection starts with the assum purpose of the acts was to punish offences against of the United States, and that they are merely crimes. If this were a correct assumption; if the the 5th, 6th, and 7th sections of the act of July municipal regulations only, there would be force i that Congress has disregarded the restrictions of amendments of the Constitution. Those restrict material to the argument, are, that no person s answer for a capital, or otherwise infamous crime, sentment or indictment of a grand jury; that no deprived of his property without due process of law criminal prosecutions the accused shall enjoy the and public trial by an impartial jury of the St wherein the crime shall have been committed. Bu tion of the plaintiff in error is not well made; if t not enacted under the municipal power of Congres the punishment of crimes against the sovereignty States; if, on the contrary, they are an exercise of of the government, — it is clear they are not affect tions imposed by the 5th and 6th amendments. stand to have been conceded on the argument. therefore, is, whether the action of Congress v exercise of the war power." Ib. 305.

The opinion proceeds to set forth the usage, of international warfare, as being co cable in the circumstances of this case. A said: —

"It is hardly contended that the act of 186 virtue of the sovereign rights of the government. It it imposed no penalty. It declared nothing unlaw exclusively at the seizure and confiscation of p

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intended to be used, to aid, abet, or promote the rebellion, then a war, or to maintain the war against the government. It cannot be maintained that there is no power to seize property actually employed in furthering a war against the government, or intended to be thus employed. It is the act of 1862, the constitutionality of which has been principally assailed." Ib. 308.

Mr. Justice Strong proceeds to justify the purpose of "seizing and confiscating the property of rebels," as provided in the 5th and following sections, on the ground of their being public enemies: —

"The provisions made to carry out the purpose, viz., confiscation, were legitimate unless applied to others than enemies. It is argued, however, that the enactments were for the confiscation of property of rebels, designated as such, and that the law of nations allows confiscation only of enemy's property. But the argument overlooks the fact that the rebellion then existing was a war. And, if so, those engaged in it were public enemies. The statute referred to the rebellion then in progress. Whatever may be true in regard to a rebellion which does not rise to the magnitude of a war, it must be that when it has become a recognized war those who are engaged in it are to be regarded as enemies. And they are not the less such because they are also rebels. They are equally well designated as rebels or enemies. Regarded as *descriptio personarum*, the words 'rebels' and 'enemies,' in such a state of things, are synonymous." Ib. 309.

In this case three justices dissented from the judgment of the court; Mr. Justice Davis, only on the disposition of the case, though concurring in maintaining the constitutionality of the Acts of Congress. Ib. 328.

Justices Field and Clifford dissented in an opinion delivered by the former, holding,—

"It would seem clear, therefore, that the provisions of the Act were not passed in the exercise of the war powers of the government, but in the exercise of the municipal power of the government to legislate for the punishment of offences against the United States. It is the property of persons guilty of certain acts, wher-

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ever they may reside, in loyal or disloyal States, whi directs to be seized and confiscated." Ib. 319.

The dissenting Justice proceeds to argue the the legislature from the history of the bill, it that it was modified in its passage, in view tional objections insisted on by President Linc and in view of the constitutionality of such says: —

"It seems to me, that the reasoning which uphol ings in this case works a complete revolution in our prudence, and establishes the doctrine that proce punishment of crime against the person of the of disregarded, and proceedings for such punishment against his property alone, or that proceedings may l same time both against the person and the proper double punishment for the same offence be inflicted.

"For these reasons, I am of opinion that the l which it is sought to uphold the judgment in this c ranted by the Constitution." Ib. 323.

In the case of Tyler v. Defrees, which f Wall. p. 331, the majority reaffirm the doctri case; while the same justices repeat their di constitutional question. The property cor real estate in the District of Columbia. In opinion of the court was delivered by Mr. J from which a few passages may well be give illustrating the nature of the power attributed and also the view taken of the parties bellige

"Undoubtedly, by the individual whose property and condemned for acts of hostility to his governn pursued would be scrutinized with an eye quick to and it is not strange that this critical spirit should gument here. When to this is added the belief, l that the Federal government, however strong in foreign foe, lies manacled by the Constitution, and

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feet of a domestic enemy, we need not be surprised that both the power of Congress to pass such a law as the one in question, and the capacities of the courts to enforce it, should meet with a stout denial.

"But we do not believe that the Congress of the United States, to which is confided all the great powers essential to a perpetual union — the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and on sea — is deprived of these powers when the necessity for their exercise is called for by domestic insurrection and internal civil war — when States, forgetting their constitutional obligations, make war against the nation, and confederate together for its destruction." . . .

"As the act was designed to introduce the principle of confiscating enemy property seized on land, like that seized on water, applying the confiscation, however, to the property of a limited class of enemies, instead of to all enemies, it was conceived that the proceeding should be, in its essential features, analogous to those which the courts of admiralty were accustomed to use in property captured at sea," &c. Ib. 345.

Mr. Justice Davis concurred in the judgment, though "not able to concur in all that was said by the court in preceding opinion." Mr. Justice Field again expressed his dissent, in an opinion in which Mr. Justice Clifford concurred. Much of the discussion in this case was founded upon the question of procedure under the act. The validity of the statute having been mainly argued in Miller *v.* The United States. But on this point it is further said here by Mr. Justice Field, referring to that case, Ib. 354: —

"In that dissenting opinion I expressly stated that it had been held that, when the late rebellion assumed the proportions of a territorial civil war, the inhabitants of the Confederate States and the inhabitants of the loyal States became reciprocally enemies to each other, and that the inhabitants of the Confederate States engaged in the rebellion, or giving aid and comfort thereto, were at the same time amenable to the municipal law as rebels, and that the correctness of this determination was not disputed; that the question was not as to the right of Congress to adopt either of these

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courses, but what course had Congress, by its legislatic It is indisputable, that whatever Congress may au done, by the law of nations, in the prosecution of v independent nation, it may authorize to be done whe the prosecution of a territorial civil war against the mies of the United States. I contend only that t which the law of nations has imposed in the condu tween independent nations, should apply to and gove States in whatever war they may prosecute. I do n never have doubted, for a moment, that the United all the power necessary to suppress all insurrect formidable, and to make their authority respecte throughout the limits of the republic. But this reco power of the government cannot be permitted to pr parison of all legislation, adopted to uphold its auth Constitution. And in so comparing the Act of Ju am unable to find in that great instrument any sa clauses in the act providing for the seizure and confi property of persons charged with particular criminal find it in the war powers of the government, for they the confiscation of the property of public enemies. I in the municipal power of the government to leg punishment of crimes;[1] for that is subject to lim secure to the accused a trial by jury of his peers, a be confronted with the witnesses against him.

"It is true, as already stated, that enemies partic rebellion, or giving aid and comfort thereto, mig treated as rebels and held amenable to the municipal terms 'enemies' and 'rebels' are not synonymous, e rebellion assumed the proportion of a territorial permanent resident of the Confederacy was an enem may always have opposed the rebellion and remaine feelings and action to the national government. His enemy was determined by his residence, and had

[1] The bewildered Justice might well adapt for his learne wondering wail of the Pinafore chorus: —

"However could you do it?
Some day, no doubt, you'll rue it!
You mixed those children up,
And not a creature knew it!"

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with his personal disposition or conduct. But he was not a rebel, and could not have been prosecuted as such, unless he was personally guilty of treasonable acts.

"Congress well understood the distinction between enemies and rebels, and we are not justified in supposing that it intended to disregard this distinction in its legislation, even were that practicable, as it is not?"

In United States *v.* Klein, 13 Wall. 128, Chief Justice Chase says of this legislation: —

"No titles were divested in the insurgent States, unless in pursuance of a judgment rendered after due legal proceedings. The government recognized, to the fullest extent, the humane maxims of the modern law of nations,[1] which exempt private property of non-combatant enemies from capture as booty of war. Even the law of confiscation was sparingly applied. The cases were few indeed in which the property of any, not engaged in actual hostilities, was subjected to seizure and sale.

"The spirit which animated the government received special illustration from the act under which the present case arose. We have called the property taken into the custody of public officers under that act a peculiar species, and it was so. There is, so far as we are aware, no similar legislation mentioned in history."

In this important case, the question arose under a *proviso* introduced into a bill making appropriations for the payment of judgments of the Court of Claims, which became a law July 12, 1870 (16 U. S. Stat. 235), to prevent that court, and the Supreme Court on appeal, from giving that effect to a pardon by the President which had been sustained by the latter court in the then recent case, United States *v.* Padelford (Ap. 30, 1870), 9 Wall. 531.

All the members of the court agreed in denying the validity of this legislation.[2] But Mr. Justice Miller, with

[1] This doctrine that the act was in mitigation of the severity of the belligerent right is much insisted on by Waite, Ch. J., in Lamar *v.* Browne, 2 Otto, 194, 195.

[2] Opinion of the court. Ib. 148. "Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can

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whom Mr. Justice Bradley concurred, delivered a dissenting opinion, relying on the position supposed to have been taken in United States *v.* Anderson, *ante*, p. 67, as upholding the idea of confiscation as punishment; at least to the extent of giving a stringent construction to the provisions for restoration of property in the case of rebels claiming the benefit of amnesty. Ib. 149.

In Armstrong *v.* United States, and Pargoud *v.* United States, Ib. 154, 156, Chief Justice Chase delivered the opinions of the court, without dissent, to the effect that the President's proclamation of Dec. 25, 1868, granting pardon and amnesty unconditionally, and without reservation, to all who participated, directly or indirectly, in the late rebellion, relieves claimants of captured and abandoned property from making proof, as was required by the act, that the claimant never gave aid or comfort to the rebellion. It is unnecessary to prove adhesion to the United States, or personal pardon for taking part in the rebellion.

In a number of cases, which, together, are named The Confiscation Cases, 20 Wall. 92, the questions presented related principally to matter of procedure. The doctrine that the proceedings are *in rem*, and "in no sense criminal proceedings, and they are not governed by the rules that prevail in respect to indictments or criminal informations," is repeated by Mr. Justice Strong, Ib. 104, and the doctrine of Miller *v.* United States re-affirmed; Justices Field and Clifford adhering to their dissenting opinions in that case. Ib. 113.

change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt, and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority, and directs the court to be instrumental to that end. . . . We repeat that it is impossible to believe that this provision was not inserted in the appropriation bill through inadvertence." In dissenting opinion: "is unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President."

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Latest Doctrine on Confiscation Acts.

In Haycroft *v.* United States, 22 Wall. 81, the opinion of the court delivered by Chief Justice Chase is made up largely of quotations from his earlier opinions, in United States *v.* Padelford, and United States *v.* Klein, resting on the position that the Act of Congress in question was entirely founded on belligerent rights. The very term *confiscation* is repudiated: —

"There is here no question of confiscation. The title of the United States, whatever may be the rights it carries with it, is by authorized capture or appropriation of enemy's property on land. But the same statute which authorized the capture gave a right to certain persons to demand and receive restoration of their property taken."

In Lamar *v.* Browne, 2 Otto, 187, and in Young *v.* United States,[1] 7 Otto, 58, the judicial discrimination of *cotton*, as property particularly marked out for seizure under belligerent right, was very fully reasserted by the court in opinions delivered by Mr. Chief Justice Waite, saying: —

"If they had had no cotton, they would not have had, after the first year or two, the means to support the war. To a very large extent, it furnished the munitions of war and kept the forces in the field. It was, therefore, hostile property, and legitimately the subject of capture on the territory of the enemy." 2 Otto, 194.[2]

[1] In this case, the question presented on a claim for restitution for cotton seized, which had belonged to a non-resident alien who was known to have aided the rebellion, commercially, had the aspect of a case arising under private international law, in which connection it may be noticed further on.

[2] In this opinion it is stated: "As late as September 27, 1865, the government had not given up its claim of title to cotton belonging to exporting and importing companies, for, on that day, the Secretary of the Treasury issued a circular letter to the government agents, directing them to take charge of all such cotton, and treat it as property which was used to aid the rebellion, and, therefore, belonging to the United States. The military forces, therefore, in taking possession of the cotton in controversy, were clearly acting within the general scope of their powers as an army still in possession of enemy territory, under orders from their superior." Ib. 197. This seizure was in the autumn and December, 1865.

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With reference to the foundation for this legislation, it is said in this opinion. Ib. 195.

"It is quite true that the United States, during the late war, occupied a peculiar position. They were, to borrow the language of one of the counsel for the plaintiff, both 'belligerent and constitutional sovereign;' but, for the enforcement of their constitutional rights against armed insurrection, they had all the powers of a most favored belligerent. They could act both as belligerent and sovereign. As belligerent, they might enforce their authority by capture; and, as sovereign, they might recall their revolted subjects to allegiance by pardon, and restoration to all rights, civil as well as political. All this they might do when, where, and as they chose. It was a matter entirely within their sovereign discretion.

"It was in this spirit that the Abandoned and Captured Property Act was passed. It gave the Court of Claims authority to adjudicate between the belligerent sovereign and the citizen, and to determine the question of capture or no capture, if the owner or claimant appearing there had been loyal," &c.

In Wallach *et al. v.* Van Riswick, 2 Otto (92 U. S.), 207, Mr. Justice Strong, delivering the opinion of the court, said: —

"This act is an act for the confiscation of enemies' property. Its purpose, as well as its justification, was to strengthen the government and enfeeble the public enemy by taking from the adherents of that enemy the power to use their property in aid of the hostile cause."

In Conrad *v.* Waples, 6 Otto (96 U. S.), 283, Mr. Justice Field, delivering the opinion of the court, said: —

"The law of July 17, 1862, so far as it related to the confiscation of property, applied only to the property of persons who thereafter might be guilty of acts of disloyalty and treason."

In Burbank *v.* Conrad, 6 Otto (96 U. S.), 310, in a dissenting opinion applying as well to the last case, Mr. Justice Clifford said: —

"Congress intended by the Confiscation Act, when it was duly executed, to deprive the guilty owner of the means by which he

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could aid the enemy, and it left him no estate that he could convey for that or any other purpose," citing Wallach *v.* Van Riswick, 2 Otto, 92 U. S. 202.

It appears then, from the language generally used by the Supreme Court in cases arising under the Confiscation Acts, that the majority of its members do not regard their provisions as punitive municipal law, nor consider the clauses of the fifth section of the act of July 17, 1862, as correspondent to the words in the title: "*to punish treason and confiscate the property of rebels*," however well devised for "*other purposes.*"[1]

Judge Chase at the Circuit, June, 1867, for the District of North Carolina, in the case of Shortridge *v.* Macon, 1 Abbott's U. S. Rep. 56; Chase's Decisions, 136, did say that the acts of violence against the civil and military officers of the government of the United States, which had occurred in North Carolina, corresponded in character with that "levying war against" the United States which, in the Constitution Art. III., § 3, had been defined as "treason against the United States." But as nobody then on trial before him was charged for such acts of violence, much less sentenced for treason on such a charge, the question, who the wicked individual was who then and there levied war, is judicially undetermined up to the present moment; and, consequently, the judge's opinion as to the treasonable character of these acts is no more conclusive than that of anybody else.

The indictment of Mr. Jefferson Davis for treason, in the United States Circuit Court for Virginia, March Term, 1868, was dismissed after the issue of the Proclamation of general amnesty, by President Johnson, Dec. 25, 1868.

[1] Yet in U. S. Rev. St. § 5332, under marginal note "Punishment of treason," among cases cited are: Confiscation cases, 20 Wall. 92; Wallach *et al. v.* Van Riswick, 92 U. S. 202; Windsor *v.* MacVeigh, 93 U. S. 274.

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Chase's Decisions, 80 to 124. But from an i alone, no legal principle can be derived.[1]

If then the cases under the so-called "C Acts," should be left out of view as not carryi punishment whatever, it may be said that ther no judicial determination of any persons, bei of one of the eleven States compromised by the as guilty of, or liable to prosecution, sentence, a ment for treason or rebellion, by reason of acts since the ordinances of secession were passe States.[2]

In most civilized countries, if the courts ca or will not settle, the law of allegiance and t treason, it would seem trifling to look for ins any other source. Still, in following up the his judicial doctrine or *no*-doctrine on this point, it look at the action of the Executive and of Con have in reference to State existence and bellige

The language of Mr. Lincoln has already b cited as designating *citizens* and *inhabitants*, in

[1] In Shortridge *v.* Macon, after stating the pretension ordinance of secession "absolved the people of the State fr tions as citizens of the United States, and made it impos treason by levying war against the national government," said: "No elaborate discussion of the theoretical question seems now to be necessary. The question, as a practical one is not likely to be revived. It is enough to say here that, in the answer which it has received from events, is that whic construction of the Constitution warrants and requires." Ch 140. Is it to be inferred that, if Mr. Davis's indictment had g the judge would have charged that the question was "theoret by the "issue of battle" only?

[2] In Rev. Stat. U. S. ed. 1878, p. 25, the only cases cited tutional definition of treason are the older ones, United State 2 Dall. 335; United States *v.* Mitchell, 2 Dall. 348; *Ex par* Swartwout, 4 Cranch, 75; United States *v.* Aaron Burr, 4 Cr for the clause limiting the punishment for treason, Bigelow *v.* 339; Day *v.* Micou, 18 Wall. 156; *Ex parte* Lange, 18 Wall *et al. v.* Van Riswick, 92 U. S. 202.

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from *States*, as the parties chargeable with insurrection, rebellion, and treason.

That Mr. Johnson must have believed that rebellion and treason were chargeable against some citizens individually, must be inferred from his various Proclamations of Amnesty; that of May 29, 1865, 12 U. S. Stat. 758, which makes exception, from its benefits, of certain persons or classes of persons, and that of Sept. 7, 1867, 15 U. S. Stat. 699, that of July 4, 1868, ib. 702. His Proclamation of Dec. 25, 1868, 15 U. S. Stat, 712, declares, —

"To all and every person who directly or indirectly participated in the late insurrection or rebellion full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies, during the late civil war, with restoration of all rights and privileges," &c.

If the so-called *Confiscation Acts* are to be left out of view, as not being intended for municipal penal legislation (*ante*, p. 79), the only legislation affecting private persons in view of past transactions, or which can be popularly supposed to have an application to anybody in view of past transactions called rebellion or insurrection, is to be found in the several Acts of Congress removing the disabilities declared in the 3d Section of the Fourteenth Amendment, adopted July 21, 1868.[1]

It may very probably be commonly held, in this connec-

[1] To be found among the Private Acts, such as *An Act to relieve certain persons, &c.*, passed Dec. 14, 1869, 16 U. S. Stat. 607. "After the authority of government shall have been re-established over the rebellious districts, measures may be taken to punish individual criminals. The popular sense of outraged justice will embody itself in more or less stringent legislation against those who have brought civil war upon us. It would be surprising if extreme severity were not demanded by the supporters of the Union, in all sections of the country. Nothing short of a general bill of attainder, it is presumed, will fully satisfy some of the loyal people of the slave States." W. Whiting, The War Powers under the Constitution, 84, published in 1864.

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tion, that, whatever may be the dependence of ot tries on courts of law to pass sentence on rebels c we have here, in virtue of a written constitutio rior method. It will perhaps be said, this Ar was, itself, judgment by the supreme power-hol the persons then chargeable for treason and rel well as to the degree of punishment; a judgm precluded all ordinary judicial inquiry to dete private persons as guilty of treason.[1]

It was on this construction of the Amendment Davis's motion to quash the indictment against h based, in these words, —

"And the defendant alleges in bar of any proceedin said indictments, or either of them, the penalties and denounced against him for his said alleged offence b section of the fourteenth article of the Constitution of States, forming an amendment to such Constitution, ar that any judicial proceeding to inflict any other or f penalty, or punishment upon him for such alleged o admissible by the Constitution and laws of the Un Chase's Decisions, 85.[2]

[1] Fourteenth Amendment, § 3. "No person shall be a S resentative in Congress, or elector of President and Vice-Pr any office, civil or military, under the United States, or un who having previously taken an oath as a member of Con officer of the United States, or as a member of any State le an executive or judicial officer of any State to support the the United States, shall have engaged in insurrection or r the same, or given aid or comfort to the enemies thereof. may, by a vote of two-thirds of each House, remove such d clared to have been ratified by Proclamation of the Secretar 28, 1868, under direction of joint resolution of Congress. Statutes, p. 31, note.

[2] Under this construction and application of the Amer appear that, as Mr. Davis could not be fined, nor impris under the statute, because already punished by disqu office under the Amendment, so, *vice versa*, he should not be offiee, under the Amendment, if he had got fined, or imp under the Statute.

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After hearing arguments on both sides, ib. 85–122, the court — Judges Chase and Underwood — disagreed, and certified their disagreement to the Supreme Court of the United States. Ib. 123.

"Whereupon the court adjourned. No further proceedings were had in the cause. The Proclamation of General Amnesty by the President of the United States, at the end of December, 1868, effectually disposed of the criminal prosecution, and the certificate of disagreement rests, among the records of the Supreme Court, undisturbed by a single motion for either a hearing or a dismissal. At a subsequent term of the Circuit Court, the indictments against Mr. Davis were, on motion of his counsel, dismissed." Ib. 124.[1]

To this the reporter adds, —

"The Chief Justice [Chase] instructed the reporter to record him as having been of opinion, on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the Fourteenth Amendment." Ib. 124.[2]

Since each State, as a several State, and as one of the United States, exercised its authority in the adoption of this Amendment, it was like the legislative act of an integral or consolidated sovereignty, and, as such, any legisla-

[1] Is it impertinent to ask, If the disqualification in the Amendment is intended as penalty for past offences, like fine, imprisonment, and hanging, under the statutes, why does not the amnesty relieve the persons affected, from the disability, as it would from sentence of loss of property, liberty, and life?

[2] We have, therefore, the opinion of the Chief Justice that the disqualification was intended as punishment for the crime of engaging in insurrection and rebellion against the United States, &c., and in Mr. Davis's motion to quash the indictment we have his own admission that he did things which, in the Amendment, are called by the same ugly names. But there is no judicial declaration, that the acts so charged and so admitted were criminal, to be found on the records; and neither Mr. Davis, nor any of his associates have ever done or said any thing equivalent to an admission to that effect. In the absence of all judicial inquiry, how is any particular person distinguishable as within the terms of this Amendment? Unless ordinary popular opinion — *at the North* — is supposed equivalent to judicial sentence?

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tive attribution of criminal character to antecedent acts may be conclusive. But it is legislation in the nature of *Ex post facto* law, *Bills of Attainder*, *Bills of Pains and Penalties*, and *Test Acts*, which English-speaking communities have been educated to regard as peculiar to despotic governments.[1]

But if the doctrines of English civil liberty are not repudiated in this application of the Amendment to the private citizen, the interpretation claimed for it presents an anomaly, considered as public law determining the related powers of the general government and of the several States.[2]

The question, whether treason, in this instance, was chargeable on certain natural persons depended on the question whether they *then* stood in that relation to the United States, or the government of the United States, as citizens, that they could commit treason. If the Amendment is regarded as a judgment against the citizens of eleven States, forced by the government of the United States from those eleven States, as being parts of the United States, it is something worse than an anomaly. If regarded as constitutional demarcation of the distribution of power between the States united, and the States severally, to settle their respective claims on the allegiance of the citizen *in the past*, the Amendment presents a new phenomenon in the history of American constitutions.

[1] On the motion to quash the indictment in Mr. Davis's case, Mr. O'Conor maintained, "the provision is retrospective only. Penalties and punishments denounced by positive law are *prima facie* prospective only. The ordinary legislator is rarely empowered to give them a retrospect. But the sovereign authority, from which this provision emanated, was under no other than moral restraints in that respect, and it will be conceded that the disqualification is pronounced for offences previously committed. That intent cannot be denied, and the words employed are adequate to express it. But they are wholly incompetent to include past and future delinquents." Chase's Decisions, 113.

[2] Story, Comm. § 1344, 1345.

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That the distribution of the powers of sovereignty between the States severally and the States in union should, in cases arising under a written constitution, *as law*, be determined by a judiciary forming part of the general government,[1] was a political experiment without precedent. But if this Amendment is taken for a judgment on the question of allegiance by the States in union against themselves separately, under a law therein declared, it is something difficult to define; unless by comparison with the *petitio principii* in logic, or the Hibernian bull.

A change in the distribution of sovereignty may have taken place, — whether by the military success of one claimant, or by voluntary cession of the former power-holder, is immaterial for this inquiry; and this may now be defined in the Amendment.[2] But neither Amendment, nor cession, nor issue of battle, can be equivalent to judicial settlement of treason, as a question under the pre-existing distribution.

The only volume strictly belonging to legal literature which has appeared since the war, and which might be cited in an exposition of the American law of treason, is the volume of decisions by Chief Justice Chase, edited by General Bradley T. Johnson; generally cited as Chase's Decisions.[3]

[1] This is on the supposition that this had been the original design. See *ante*, the note on p. 19.

[2] Mr. B. T. Johnson, in Preface to Chase's Decisions, IV., says that the late Chief Justice's "decisions on the questions growing out of the war . . . had settled the principles on which the new Constitution of the United States was to be administered under the new conditions of society."

[3] Reports of cases decided by Chief Justice Chase in the Circuit Court of the United States for the Fourth Circuit, during the years 1865 to 1869, both inclusive, in the Districts of Maryland, Virginia, North Carolina, and South Carolina. Revised and corrected by the Chief Justice: Containing an Appendix with the Constitution of the Confederate States of America, and the Conscription, Impressment, and Sequestration Acts of that Government. By Bradley T. Johnson, of the Virginia Bar. New York: Diossy & Company. 1876.

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It appears from the preface that the Chief Justice had co-operated in Mr. Johnson's publication, and had "revised the manuscripts, making such corrections as he deemed necessary, which were generally merely verbal, and in the main consisted in softening the language and expressions used in alluding to the war. He struck out the words 'rebellion,' 'rebels,' 'insurrection,' and 'insurgents,' and substituted the words 'civil war,' belligerents,' &c., wherever the sense of the text would permit, and instructed" Mr. Johnson "to do so wherever he had overlooked it." [1]

The expressions which have been "softened," are the most material part of the opinions, in their political bearing. Those which have been thus manipulated, after delivery, can hardly claim to be *reported*, as *decisions* judicially developed with the prestige of adjudged cases. If statements of political fact derive any authority from the judicial office, it must be with their original diction.

This volume should rather be regarded as a joint exposition of the views of two private jurists, as to the political questions, than as a volume of *decisions*. Accepting all the statements in the preface, it is still doubtful whether Judge Chase intended to abandon any doctrine on the subjects connected with the war which may be gathered from his decisions in this volume, or reported elsewhere; and how far the Chief Justice of the Supreme Court, and his reporter, distinguished not only as a lawyer, but also as a general officer in the military service of the recent Con-

[1] The question is whether Judge Chase intended to repudiate his own language in Shortridge *v.* Macon, Chase's Dec. 140. "Nor can we agree with some persons, distinguished by abilities and virtues, who insist that, when rebellion attains the proportions and assumes the character of civil war, it is purged of its treasonable character, and can only be punished by the defeat of its armies, the disappointment of its hopes, and the calamities incident to unsuccessful war." His reporter intimates that he did so intend. See *ante*, p. 52.

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federacy, were in accord, as publicists, on the political question, does not appear.

As stated in beginning this inquiry, judicial opinions on political questions have value, mainly, as testimony; which may be compared with other evidence. A change of language, in reference to decided cases, where no new circumstances are alleged, is discrepancy, which weakens the force of either statement.

Can it be supposed that, if the case of Texas *v.* White had been included in this volume, as had been proposed before the decease of the Chief Justice, he would have "softened expressions" which he had there used in the name of the court?

If any conflict of political doctrine may be traced on comparing the language of courts, presidents, Congress, or professional jurists, in reference to the position of the States, or the questions of belligerency, or of treason, as it has here been cited, it might readily be associated in our minds with that general conflict of public belief as to the nature of the union of the States which had existed at and from the time of the adoption of the Constitution; leading to two views, more or less distinctly opposed, of the powers of the government of the United States and of the rights of the States, to which expression had been given not only from the Presidential chairs, in Congress, and on the Bench, but also in the rivalship of two great political parties, holding one or the other of these views, more or less constantly and consistently, and, above all, in the antagonism of sections distinguished as "the North," and "the South," culminating in a civil war, in which the affirmance and denial, on either hand, of one and the other of these views seemed to be involved.

According to one of these two prevailing views, — the view held, in a general way, by one of these two parties, and one "political school," and more distinctly by "the

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South," — the operation of the Constitution, as law, in each several State is constantly dependent upon the continuing consent of such State. It was, as the obvious consequence of this proposition, that the right (faculty) of each State to nullify the operation of the laws of Congress within its own limits, and the right to secede — "the right of peaceable secession" — for any reason appearing sufficient to the State, or, for that matter, for no reason at all,[1] was asserted by the Southern States without much distinction of former party lines.

According to the opposite view, generally received among the opposed party, or rather by one political school, and more particularly by "the North," the operation of the Constitution as to each State is constant and independent of the consent of the State; and it is as a consequence of this proposition that nullification and the right or capacity of a State to secede, "the right of peaceable secession," has been generally denied and resisted by those who supported the government of the United States against the attempt to establish a Southern Confederacy.[2]

But in none of the judicial opinions above cited is the

[1] The right being a political right, there is neither morality nor immorality in its exercise, if it exists. A citizen might have opposed the purpose of his State to secede, and yet support it from a sense of duty, when it resolved on by the State. As in the instance of Mr. A. H. Stephens, whose course as an official of the Confederacy, after having opposed, in convention, the secession of his State, has often been stigmatized at the North as violation of acknowledged duty. (As in Report of the Committee on construction, "a man who against his own declared convictions," &c.) In fact, his previous opposition should be held a guaranty of his belief in the political capacity of the State.

[2] It is undeniable that, in the minds of many persons who supported the government against attempted secession, the political duty, founded on this view, was entirely subordinate to motives of resisting the continuance of negro slavery (see, among others, the pamphlets issued by the Loyal Publication Society, New York), and that many others regarded their own cause as represented by the General Government, as the party claiming their political obligation in the war.

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right or capacity, in a State, recognized; and we may assume that no theory of the Constitution which necessarily involves it has been accepted by any member of the court since 1861, and certainly not by a majority.[1]

On the contrary, the existence of such a right or capacity is, in many instances, expressly denied by various members of the court; some of whom, by apparent reversal of the ancient maxims, — *Cedant arma togæ; — Inter arma silent leges*, — in their statements of this, profess to accept the demonstration of military success as similar, in its relation to judicial opinion, to forensic argumentation.[2]

[1] Probably even Mr. Justice Grier did not consider it recognized by himself in what he said in the Prize Cases and in Texas *v.* White; though it may be difficult to see how such a conclusion from his language can be logically avoided.

[2] See the language of Grier, J., in Texas *v.* White, *ante*, p. 17, and in the Prize Cases, *ante*, p. 17. In the Legal Tender Cases, 12 Wall. 553, Bradley, J., said: "The doctrines so long contended for, that the Federal Union was a mere compact of States, and that the States, if they chose, might annul or disregard the acts of the National legislature, or might secede from the Union at their pleasure, and that the General Government had no power to coerce them into submission to the Constitution, should be regarded as definitely and for ever overthrown. This has been finally effected by the National power, as it had often been before, by overwhelming arguments."

This view of the demonstration, in which artillery and logic are on the same plane, is probably in harmony with prevailing popular sentiment. It is almost needless to refer to publications (historical or political) since the war in which similar ideas have been expressed; *e. g.*, Frothingham's Rise of the Republic of the United States, pp. 3, 4, 608; G. T. Curtis's Discourse on the Nature of the American Union, &c., p. 8; — "But this was the great point of the debate that came, after all other modes of debate had been exhausted, to be referred to the arbitrament of battle." If the issue of the war had been otherwise, would the courts have held, against the old "overwhelming argument" that the doctrine of a State's right of peaceable secession had been established, for the States remaining in the Union? If the issue of battle is to be regarded like a judicial precedent for similar cases, may the political motives be taken in consideration, in determining what may be a similar case? Will the precedent hold in an instance where the conservation of domestic slavery is *not* involved? This suggestion is relevant, in view of the countless instances in which the war has been regarded as one for or against certain doctrines of natural right, and not, intrinsically, for the maintenance of some established political authority.

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But whether "effected" by a certain amount of blood-shed, or "by overwhelming argument," the doctrine contended for is, so far, still the same it had been from its earliest period.

In these recent opinions of the court, more has come to light.

The States are not only bound to regulate themselves by its provisions, but the Constitution compels them to be what they are, — to exist, — to *be* States.

The doctrine thus announced by the court is really one which no political party, or school, or section of the country, had ever before asserted.[1] The discovery of this fa ulty in a written instrument, so many years after i adoption, should, if real, be regarded as marking an era the development of constitutional politics. The merit such discovery, however, should not perhaps be engross by the judiciary.

The question, at the close of the war, was, — Where the sovereign power vested which was vindicated by military success of the Constitutional government? a now each citizen is obliged to ask himself, —

Must I, if I reject the doctrine of State sovereig with the right of peaceable secession, accept propositi like these, about — States holding sovereignty as State the union under law derived from that sovereignty States composing a union which compels them to com it; — States, separately, owing allegiance to themselve

[1] It may, however, be taken up hereafter by some, for whose pol advantage its discoverers would not have expected it to apply. Se Resolutions reported by joint committees of the Senate and House o Virginia legislature, Richmond, Jan. 18, 1879, in regard to the acti Judge Rives, of the Western District of Virginia, especially the fourth, " the preservation of the States, and the maintenance of their governmer as much within the design and care of the Constitution, as the preservat the Union and the maintenance of the Federal government, and se and independent autonomy of the States is necessary to the Union und Constitution." Newspaper reports of the date.

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a union; — a union distinct from the States which compose that union; — States in union against their wills; — States, under a general government which came into being and which continues to be by their action, constituting a union in respect to which they are, singly, like counties or townships to a State; — war against the Union by States which are themselves members of that Union; — acts proved void by a war waged because they were not valid; — a government suppressing a rebellion, by arms, to find out whether there was any rebellion against it at all; — governments supported by the people of a State, which are not the State governments, though the State is still a State; — States usurping their own governments; — State governments usurping by the will of the people governed; — States suffering, by the will of their people, from a non-republican government, and entitled to have a government forced on their people, as republican government guaranteed to the State; — States and people rebels, because under usurped governments; — States keeping their political capacities, without power to use them, while their governments and all their citizens are public enemies of the United States, including such States; — States having belligerent capacity, by their political nature, while their citizens, by fighting under their banners, commit treason against the other belligerent; — conquest, or political subjugation, and judicial punishment for treason being predicable on the same facts; — a government deriving power from the law of international war to make a new law of war; — raw agricultural products becoming munitions of war by being commercial staples in time of peace; — powers belonging to commanders in the field, by usage of war, exercised at a belligerent's capital by a legislature under a limited constitution; — legislative power by a belligerent state over its subjects as alien enemies; — citizens whose property, taken

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from them as alien enemies, is returned to them on proof that they were not traitors; — citizens, in the character of alien enemies, receiving punishment due to them as traitors or rebels; — citizens who, in law, are alien enemies, — citizens who suffer punishment for treason when no court has passed on the question of treason; — constitutional provisions for securing faithful administration of government applied as amnesty, for leaders, against loss of life, liberty, and property, under statutes still enforceable against the commoner rebels, &c., which have been presented, as the only alternative, by Executive, Legislature, Judiciary, and popular acclamation?

When contradictions in terms are stated as conclusions from serious argument, any further effort at demonstration is out of place. The sort of reply then becomes allowable to which Mr. Lincoln was somewhat prone in legal and political controversy; and which, if it have no name in systems of logic, might well have one in *un*systematic rhetoric as *argumentum de ludicro*, or *de ludibrio*.

A good little boy said to another boy, — "Your father and my father are brothers; but you and I are not cousins."

How was this?

Well, that good little boy *lied*.

Can Presidents, Congress, the Supreme Court, or the "sovereign people," separately, or all together, make of a contradiction in terms any thing but a contradiction in terms?

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CHAPTER III.

THE POSSESSION OF SOVEREIGN POWER NOT DETERMINABLE BY THE CONSTITUTION AS LAW. — IN WHAT SENSE DETERMINABLE BY HISTORY. — DIFFERENT HISTORICAL STATEMENTS AS TO THE LOCATION OF THAT SOVEREIGNTY BY WHICH THE CONSTITUTION WAS ESTABLISHED. — THE HISTORICAL QUESTION AS AFFECTED BY THE WAR.

THE sphere of American politics is so remote from that of the old world that it escapes that constant and interested observation which is a mutual necessity for the various states of Europe, and which originates there, and, more particularly, in England, such a wealth of contemporary history and political criticism. Americans are, for this reason, inclined to feel more flattered than is perhaps consistent with self-respect when their institutions are made a study by a European writer; but also disposed, perhaps, to be a little inclined to over-sensitiveness and to resent any thing like disapprobation. We cannot, however, deny that it is well for us, as a nation as well as men, to see ourselves as others see us. We ought to welcome that more interested observation and criticism which now appears as incidental to our national growth.

In the first volume of his work entitled "The Constitutional and Political History of the United States,"[1] by Dr. H. Von Holst, of Strasburg, Germany, the author explains what he there calls "the inspiration theory" of the origin of the Constitution, and the heading of his second chapter is "The worship of the Constitution and its real character."

On page 65, the author says, —

[1] The title of the first volume in the original is "Verfassung und Demokratie der Vereinigten Staaten von Amerika. I Theil: Staatensouveränetät und Sklaverei."

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Von Holst, on the Worship of the Constitution.

"It is possible for us to trace the earliest beginnings of the worship of the Constitution. At first, it was looked upon as the best possible constitution for the United States. By degrees it came to be universally regarded as a masterpiece applicable to every country."

He remarks further on, —

"This is not the place to go into a thorough investigation of the causes which led all classes of the people to a veneration for the Constitution, that bore at once the character of an esteem which did much good, and of a most ruinous idolatry, in which the idol worshipped was themselves." Ib. p. 68.

"The tendency to the creation of political dogmas kept pace with the development of democracy. At the head of all these dogmas, — those of natural rights and the social compact in part excepted, — stood the supremacy of the Constitution." Ib. p. 72.

"The political philosophy of the masses was comprised in these vague maxims. They clung to them with all the self-complacent obstinacy of the lowest and most numerous body of the working classes. They were nowhere more sensitive than here. Whoever desired their favor dared not to touch this idol of theirs, and could scarcely ignore it unpunished. The fetish had been raised up for the worship of the masses by their leaders; and the masses, in turn, compelled their leaders to fall down and adore it. Under no form of government is it so dangerous to erect a political idol, as in a democratic republic; for, once erected, it is the political sin against the Holy Spirit to lay hands upon it.

"The history of the United States affords the strongest and most varied proof of these assertions. Not only the quarrels of 1787 and 1788, but also the circumstances under which the Constitution originated, would have inclined one to believe any thing rather than that the Constitution would be chosen as the chief idol of the people." Ib. p. 75.

These expressions, with much more to the same effect, are all measurably true with regard to the popular reverence for the Constitution, as a system of general government. The details of the written Constitution have, however, always been pretty freely criticised. Considering the

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way in which its clauses have been pulled about, this way and that, by political partisans and by lawyers contending over private interests, it would be strange if it had not been blamed as well as praised.

But, aside from all such over-estimate of the provisions of the Constitution, it may be said that the German publicist has missed the very point of view which vindicates his designation of the Constitution as an American *fetish*.

The feeling towards the Constitution which it is most material for ourselves, as Americans, to understand, is not, as he has presented it, like the complacency of the artist for his own work in statuary or painting. To be sure, Dr. Von Holst had not, when he wrote his first volume, the light which has since been afforded by some of those utterances from high places which have been cited in the preceding chapters. We can now see that the feeling is akin to that in the Guinea negro's ascription to the toy he has himself made, from sticks, rags, and feathers, of the divinity of uncreated essence, and of power in respect to which he, who patched the pieces together, is a helpless slave. The Constitution, having been made, became the author of being and law of life to him who made it. The fact that there must, by the nature of things, by the conditions of all political existence, always be a continuing somebody, or some continuing somebodies, — some visible, tangible, breathing, thinking, willing, acting person or persons, — to make it *law* for anybody, is sedulously veiled from the conscience of each American. He must *believe* that the Constitution came, — from heaven or from hell, it matters not; but came, — and that we all are what we are by it, and without it would be nowhere.[1]

What is this but a fetish?

[1] The reader might recall expressions like this, "We have a right to claim and we do claim that the Constitution has done its work, it has made a nation." North American Review, October, 1876, vol. 123, p. 361.

"It [the Constitution] creates a state formed by a league," &c. Wool-

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That the existence of this feeling should be unnoticed by ourselves is largely due to the prevalence of notions as to the relation between sovereignty and law in which even Dr. Von Holst might be thought to participate. After referring to the *Compromise Measures* of 1833, as a victory for Calhoun and the Southern State-rights partisans, he concludes his first volume of the English translation (p. 505) with this comment, —

"It was a terrible victory; the vanquished have been terribly scourged for the defeat suffered through their sin, and the victors have been shattered to pieces by the result of the accursed victory. But conquered and conquerors brought down punishment upon themselves, because they did not understand one thing, or, if they understood it, would not live up to it, — 'Sovereignty can only be a unit, — and it must remain a unit, — the sovereignty of law.'"

To this oracular sounding utterance, the reference, in foot-note, is "Bismark, May 14, 1872. Held; Die Verfassung des Deutschen Reiches, p. 19."

It might be suspected that the learned German himself is not beyond the charm of "glittering generalities" like those statements of doctrine in the Declaration of Independence which Mr. Rufus Choate, in his letter to the Maine

sey, Pol. Science, ii. p. 249. "As if there were not something higher and greater than the separate States created by the Constitution." Ib. p. 251.

There may be an idiosyncrasy in Americans to look about for the ultimate source of power in some document. Only by this could one explain Mr. B. T. Johnson's spreading out the Constitution, &c., of the Confederate States in an appendix to his volume of *Chase's Decisions*, "in order," as he says in his preface, "that it may be seen what force," &c.

That is, — seen how the cart would draw the horse.

But Story's argument, Comm. Book III., ch. 8, is no better; being that when the document is named "constitution" there is no need of looking for authority, §§ 338–346. Mr. Webster began his argument, Feb. 16, 1833, on Mr. Calhoun's resolutions, with this idea, — "He cannot open the book and look upon our written frame of government without seeing that it is called a *constitution*. This may well be appalling to him." Webster's Works, iii. 452.

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Whigs, April 9, 1856, designated by this epithet,[1] in the propriety of which Von Holst himself agrees.

We cannot pretend to know what a Chancellor-Prince-Professor, wielding the army of a new empire, understands by *sovereignty of law*. On the lips of a private jurist, it is nonsense; but also actively pernicious nonsense. Perhaps Dr. Von Holst would ascribe to the Constitution of the German Empire that very same uncreated essence and supernatural force, for Germans, which Americans find for themselves in their Constitution. If so, the great American fetish may have a rival.

The phrase — sovereignty of law — accepted with approval, apparently,[2] by Von Holst, is one which, with others employed in a certain school of politics,[3] has helped to generate and foster the idea which is developed in these opinions of the Court, — that constitutions of government can, as law, produce, sustain, and regulate sovereigns.[4] Sovereignty cannot be an attribute of law; because, by the nature of things, law must proceed from sovereignty.

[1] Life of Rufus Choate, 2d ed. p. 306. "The glittering and sounding generalities of natural right which make up the Declaration of Independence." Von Holst, vol. i. p. 81, note, ascribes the first use of this designation to "Calhoun, with an acuteness very wounding to Americans."

[2] That is, assuming, as his English-speaking readers must, that the authorized translation conveys the idea expressed by the original in the sentence quoted as of Bismark. Die Souveränetät kann nur eine einheitliche sein, und sie muss eine einheitliche bleiben, die Souveränetät der Gesetzgebung. But if the last word, *Gesetzgebung* should be translated *law-giving, the sovereignty of law-giving, of legislative faculty*, the author's meaning may be something quite different; as, *that sovereignty from which all law derives its authority*, the very reverse of the idea which seems intended by the phrase in the English version of Von Holst's work. If this is the case, it illustrates how vaguely words are employed in the discussion of these subjects, in the English language.

[3] Compare Professor Draper's "Civil War in America," vol. iii. ch. 95.

[4] Story, Comm., § 340, in his argument on constitutions, bases it on this falsity, citing from Federalist, No. 33 (Hamilton), "A law, by the very meaning of the term, includes supremacy," which is a contradiction in terms as excluding the supremacy of some existing sovereign to make it law.

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By the pre-existence of a sovereignty, law becomes possible; or, law exists in the exercise of sovereignty. The question is, in its nature, not a question of *law* at all: it is one of *fact*. It is such in every country, — neither of law, nor of doctrine, nor of natural right. It is the question of fact to be settled before there can be any courts of law to sit in judgment about treason, or about any other wickedness.

And the fact is one which each individual, whether called subject or citizen, is always supposed to know at his own peril; when the imminent question is put to him by each of two opposed armies: "Under which king, Bezonian? Speak or die!" or when he must ask himself in plain prose: Which of two claimants of *power beyond law* will be the one who, if I side with the other, will, or can, by his courts and sheriffs, hang me, confiscate my estate, and brand my memory with the name of traitor?

To give the answer is, — to give the Constitution; that is, to recognize a sovereign. But for the possession of sovereignty there is no law. It is therefore a question of *a constitution* in a different sense from that of any rule, written or unwritten, having the force of positive law.

It is a question of *existing* fact. History proves possession, only as past possession may be assumed to continue. Antecedents prove nothing, except as they may continue. The *fact*, so far as it is the continuing fact, is a fact in which *law* is included.[1]

[1] The fact in this inquiry is that certain living persons have at some time past held political power. This has no connection with another class of facts, — conditions of topography, climate, soil, &c., which may be thought by political economists to indicate how wide an extent of territory might best be included under a single dominion. What has been called the "scientific basis on which our nationality has rested, and must rest," is excluded from the question here considered. Portions of Mr. Lincoln's Inaugural, and second Annual Messages (Macpherson, Pol. H. 107, 220) are occupied with this sort of reasoning, which was also employed in many publications intended to help the national cause abroad, at the outbreak of the rebellion. Nor has the fact here inquired for any dependence on moral considerations.

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Doctrine distinguished from History.

From the nature of the question, *fact* and *law* being here coalescent, unified, or identical, it is difficult to distinguish *doctrine* from *history*. The writers on the subject constantly state in narrative form the political effects which they personally ascribe to public measures, as to the mere transaction of which there never has been the slightest dispute.

The two opposing doctrines have, *as doctrine*, been already stated.[1] I here attempt to present the various statements of the historical facts, which had more or less acceptance, before the outbreak of the rebellion, and up to the close of the war, and in the Reconstruction era, as basis for one or the other *doctrine*.

For convenience of reference, the paragraphs in which different historical views are stated are designated by the Roman numerals.

I. The written Constitution of the United States had, very generally, and independently of the antagonism of two political schools or parties, or of "North" and "South," because they had not differed, materially, *on this point*, been received as the statement of a transaction of some sort (as to the true nature and proper name of which there was much dispute), before which the several States, or the several politically organized peoples of each original State, possessed, in severalty, all the powers of a political sovereignty; each holding sovereignty as a unit.[2]

The maintenance of slavery, or of polygamy, or of any social arrangement, may be good or bad, without being any argument for the lawfulness or unlawfulness of political action.

All appeals for sympathy, against the rebellion, founded on these considerations, were suggestions of weakness on the real question at issue, and injured the government abroad.

[1] *Ante*, p. 87, 88.

[2] This was often declared by the early jurists. See Federalist, No. 39, and Madison's later writings; 3 Dallas, 199; 4 Cranch, 212; 19 Howard, 502; 7 Cush. 275, 317; 9 Wheaton, 187; 19 Howard, 441. It was equally assumed by Mr. Calhoun and Mr. Webster. Brownson's American Republic, 195, 240.

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II. This historical basis being accepted, the doctrine which recognized the States as the parties by whose action the Constitution was "adopted," and which, as a consequence of this, regarded the States as still possessing full political sovereignty, while the Constitution was only the revocable power of attorney to the general government organized by it, is simple. It is no wonder that, from this characteristic alone, it should have been widely accepted, from the earliest period, for true history and good doctrine.[1] But the same *historical* basis, in the complete sovereignty of the several original States, was accepted also by a very large majority, to say the least, of those who denied, as matter of *doctrine*, the rights of nullification and peaceable secession.

In the exposition of the genesis of the Constitution, leading from this historical basis to this doctrinal denial, there may have been much diversity among those who agreed in the final opinion. But whether the diversity was one in the matter of *history*, or one in the matter of *doctrine*, is as much in dispute as any thing in the whole controversy.

III. It is probable that by a very great majority of intelligent citizens, who made the denial of the right of secession, while accepting the historical basis above stated, the written Constitution was regarded as resulting from the action, whether called contract or league or cession or grant, of a number of sovereign States, but yet differing from an international treaty in this, that, by it, the States were supposed to be *bound*, precisely as private persons living *under law* are bound by their agreements; the result being the creation of a government under power of attorney, as by the other theory, but that power being

[1] It is plain that it was in this light that foreign governments, including that of Great Britain, chose to regard it at the outbreak of the rebellion. See *ante*, p. 56.

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an irrevocable one. The peculiar characteristic of this view is, that the agreement was supposed to act on the contracting parties, whether called *the States*, or *the people of the States*, by some intrinsic force ; there being no recognition of a sovereign conceived of as existing independently of the States, as feudal superior or otherwise, to whom its authority, as law for the States severally, might be ascribed. In this view, the agreement, having been written out, had been submitted to the parties, — the States ; been voluntarily signed by them, and stood on record ; and there was no more to be said. It was an agreement, and the States were bound by it. It then operated, to bind and to loose, independently of the States or of any person or persons in being, and the government organized in accordance with its provisions was of necessity its instrument, and therefore had the right and duty to enforce it against any particular State or States.[1]

A position which might fairly be thus stated had undoubtedly been long held by many persons eminent for public services and legal attainment. But there were probably more, and equally respectable, among those who, while they repudiated State secession, accepted the origi-

[1] See, for instance, Madison in a letter to Rives, March 12, 1833. Madison's Writings, IV. p. 289: In an Address delivered in Boston, July 4, 1862, by Mr. Geo. T. Curtis, it is said the people of each State executed "a cession of certain sovereign powers, described in the Constitution, to the government which that Constitution provided to receive and exercise them. These powers being once absolutely granted by public instruments duly executed in behalf of the people of each State, were thenceforth incapable of being resumed. For I hold that there is nothing in the nature of political powers which renders them, when absolutely ceded, any more capable of being resumed at the pleasure of the grantors than a right of property is when once conveyed by an absolute deed. In both cases those who receive the grant hold under a contract, and if that contract, as is the case with the Constitution, provides for a common arbiter to determine its meaning and operation, there is no resulting right in the parties, from the instrument itself, to determine any question that arises under it."

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nal several sovereignty of each State who would have preferred to say that —

IV. The States, originally being completely and individually sovereign, did each, in the adoption of the Constitution, make a voluntary cession, or grant, or surrender of a certain portion of the powers or attributes of sovereignty, which thereupon passed, as by an international political transfer, but without civic revolution, not under law but as fact, to a newly born political person to whom the name *the United States* or, less formally, *the Union*, was applicable; which portion was, thereupon, held, by such *United States*, or *Union*, in the same manner or sense as the sum of sovereign powers is held by any independent nation; not by law, but as fact: while the remainder of sovereign powers, not ceded to such *United States* or *Union*, continued to be held, by the several States, in the same manner and sense as the sum of sovereign powers is held by any independent nation; not by law, but as fact.[1]

V. There was a modification of this view which some may regard as consisting only in a verbal distinction, but which others may consider as involving a most essential difference by the use of one word. By this view, the grant of power was of the same nature as that last described; but the grantee and resulting holder was *the government* instituted in the act of grant, — the persons exercising the executive, legislative, and judicial functions, as pro-

[1] Taney, Ch. J., 19 Howard, 441; Gibbons *v.* Ogden, 9 Wheaton, 187. This is apparently the view which DeTocqueville received.

Woolsey's Pol. Science, I. p. 141, speaks of the United States as something existing or being sovereign without reference to the "States which compose the Union." "Thus we often have to say, 'the general government,' as if it were the United States, thus exalting the organ, the administration, or the law-making and the executive powers, above their true place, and, on the other hand, giving the impression that there is no State besides those States which compose the Union."

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vided in the Constitution; in distinction from the United States or the Union, as such grantee and resulting holder.[1]

VI. There were, probably, others who, while rejecting the historical basis of the original complete sovereignty of each several State, yet conceived of the same political distribution of sovereign power, less clearly defined, as having occurred at the earliest moment of the independence of the States which, having been dependent colonies, had been united in attaining it.[2]

VII. There had been many also, who, while they professed to accept the same historical basis of the several sovereignty of the original States, yet conceived of something in the nature of a peaceful revolution occurring in the adoption of the Constitution in the conventions of the several States, but *in the name only* of the several States, wherein a "people of the United States" came into being as a political unit, by assuming those powers of sovereignty which were then delegated by them to a national government under the Constitution; while the residue of powers, not so assumed and so delegated, remained as sovereign powers with the several States.

[1] President Jackson, December, 1882. "The Constitution of the United States, then, forms a government, and not a league, and whether formed by compact between the States, or in any other manner, its character is the same." Compare also the language of Mr. Curtis, *ante*, p. 101, note.

[2] The language of Chief Justice Chase, delivering the opinion of the court, in County of Lane *v.* State of Oregon, 7 Wall. 76, and to which he himself referred in Texas *v.* White, *ante*, p. 12, may perhaps be regarded as illustrating this view. "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in Union, there is no such political body as the United States. Both the States and the United States existed before the Constitution. The people, through that instrument," &c. (quoting Madison and the Federalist). . . . "The Federal and State governments are in fact but different agents and trustees of the people; constituted with powers, and designated for different purposes."

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Two General Views distinguished.

VIII. There were besides some, probably, who rejecting altogether, from their historical basis, the full sovereignty of the original States, had found a "people of the United States" such as is discerned in the view last stated, coming into being at the revolution, and, from that time forward, possessing all those powers which were afterwards entrusted to a national government by the written Constitution, as law.

It can hardly be expected that the discriminations I have attempted to make in these several statements should be universally, or even generally accepted, as being satisfactory in point of historical accuracy. It may, however, appear that so far as such, or very similar, varieties of opinion had substantial existence, they were founded on two leading conceptions of the facts, each supposed to be inconsistent with the claim of right of peaceable secession: —

First, the idea of an irrevocable grant or cession by the States of certain of their sovereign powers.

Second, the idea of some more or less revolutionary proceeding, whereby "the people," or "the nation," as an aggregate of individuals, re-assumed those sovereign powers which were by the Constitution invested in or intrusted to the government organized by it, while the residue of sovereign powers continued in the possession of the several States, or the people of those States.

It may further appear that these two ideas, though essentially antagonistic, were more or less combined in statement, especially by publicists of the Madison and Webster school.[1]

[1] Or employed separately by the same person at different times. Compare Mr. Madison's Letter to Mr. Rives, March 12, 1833, Madison's Writings, iv. 289, founded on the first statement; and his letter to Mr. Webster, March 15, 1833, ib. 293, founded on the second.

As illustrating a popular statement of this sort, — Worcester's Dict. 4to, voc.; "*Sovereignty*, — the state or power of a sovereign; supremacy; supreme power or rule. In the United States, the absolute sovereignty of the nation

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It would be obviously impossible to present any adequate citation of the earlier opinions supporting these different statements, classified with regard to their separate claims to respect, or as authorities in any degree.

Indeed, so far as the location of sovereignty is still a question for ordinary historical research, it seems that, as opinions have differed for the last hundred years, there can be no reason why the same difference should not exist for another century, or longer, being a matter on which anybody and everybody may have their several opinion.

But, as far as courts holding the judicial power of the general government are concerned, the older method — of looking for the location of sovereign power by the light of the earlier opinions or authorities — has been superseded by new elements in the present circumstances of judicial determination.

For, if the attempted secession of a State, or of a number of States, could rightfully, lawfully, or consistently, be resisted by the military strength of the constitutional government only on an assertion of the location of sovereign power resting on a particular historical basis, — it follows that the juridical exposition of the rights and obligations of private persons, arising out of the event, must also be founded, by the courts identified with the government which exercised that military power, upon the same historical basis.

However essential, or otherwise, may be the differences among those several statements of the origin of the Constitution which have here been presented as all equally supposed to be inconsistent with the right of peaceable secession, it

is in the people of the nation, and the residuary sovereignty of each State not granted to any of its public functionaries, is in the people of the State. Story, Bouvier."

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is to be noticed that they all involve the divisibility of sovereign powers.

This divisibility of sovereignty, or of the powers of which it consists, has been held, more or less distinctly, by many American publicists;[1] and appears to have been accepted by De Tocqueville, as illustrated in the case of the United States.[2]

But whatever I may think of the phrase *sovereignty of law*, I should still be ready to accept, as true, the first part of the proposition in which it is employed in the sentence cited by Von Holst, — *sovereignty can only be a unit, and must continue a unit;* that is, as meaning — that those powers in the sum of which sovereignty consists, and which, by their nature as sovereign powers, are held, not under law, but as fact, cannot be so held (*i. e.*, not under law, but as fact), in separate portions, by distinct and mutually independent personalities.[3]

And further I recognize the truth of that which Von Holst has stated, somewhat obscurely, in the passage already cited, that the ignorance, or want of consciousness, on the part of the American people, on this single point

[1] Mr. G. T. Curtis, in "A Discourse on the Nature of the American Union," &c., p. 9, note, speaks of it as "an American discovery." Judge Cooley's statement, in Constitutional Limitations, p. 2, is, — "In American Constitutional law, however, there is a division of the powers of sovereignty between the National and State governments by subjects; the former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and territories, while the States have the like complete power, within their respective territorial limits, over other subjects." Cites McLean, J., in License Cases, 5 Howard, 588; also Taney, Ch. J., in Ableman *v.* Booth, 21 Howard, 516. This question will be more fully considered hereafter, in Chap. VII.

[2] Democracy in America, Vol. i. p. 154, "The sovereignty of the United States is shared between the Union and the States."

[3] That sovereignty is indivisible. Lieber's Pol. Ethics, i. p. 252; Brownson's American Republic, 192–196; Jameson's Constitutional Convention, p. 2. The indivisibility of sovereignty was an axiom with the Southern statesmen. See Calhoun's Works, i. pp. 122, 140; A. H. Stephens's History of the War between the States, ii. p. 23.

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was the cause of the civil war,[1] — the *causa sine qua non;* and hold further, that, so far as the war, as fact, settled any thing, it was, — that sovereignty is indivisible.

For this reason, I here assume that each and all of the historical statements above referred to are now all equally excluded from judicial consideration; whatever may be the support found for them in previous decisions and opinions.

For the same reason I here assume that the written constitution must now be taken to derive its force as law either from a number of political personalities, each severally possessing (not under law, but as fact) all sovereignty as a unit; or from some one political personality, or one aggregate of political personalities, possessing (not under law, but as fact) all sovereignty as a unit.

The States-rights doctrine, involving the right of peaceable secession, was asserted upon the first alternative, as being the historical fact.[2]

Unless, therefore, the States-rights doctrine can be refuted *on this basis*, the courts, holding the judicial power of the United States government. are shut up to this alternative, — either to recognize in the history of the past, continuing to the present moment, some one personality, or one aggregate of personalities, holding sovereignty as a unit; or to accept secession, as a right, before 1861, and the whole action of the government, since that date, as usurpation, now legal and constitutional only as by successful revolution.

There may be many who will say that the personality holding sovereignty as a unit was recognized long ago, or that *now*, at any rate, the national judiciary must be un-

[1] See *ante*, p. 96.

[2] Baldwin's Constitutional Views, *passim;* Calhoun's Works, i. 161; ii. 262; iii. 149; A. H. Stephens's History, &c., Vol. ii. p. 33.

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derstood as having accepted a view distinct from either of the two general conceptions of the facts hereinbefore given on page 104, involving divisibility of sovereignty; or, more specifically, from any one of those several preceding statements which might be classed under one or the other of those general conceptions.

IX. There may be instances in recent opinions, some of which have herein been cited, to say nothing of any before the war, in which the authority of the written Constitution, not merely as law for the organized national government, and for the inhabitants of the country, individually, in their relations with that government, but as *law of existence and obedience for the States in their political capacity*, is ascribed to the nation, or to the people, as one homogeneous political personality holding all sovereignty as a unit, in distinction from the organized political people of the several States.

It will probably be held also that, so far as the existence of such a nation or people has been maintained by the Supreme Court, it has *hitherto* been recognized by its several members as of their own personal knowledge of the history of the last century, confirmed by the earlier opinions of the court[1] and the statements of a succession of jurists, as having continued from the adoption of the Constitution, or from that of the Articles of Confederation, or even from the time of the separation of the colonies from the British Empire.

It may be fair to assume that, in the view of any American tribunal, the most extended and strongest juristical array of authority supporting this position, as his-

[1] The earliest statement which may be so construed is, probably, by Jay, Ch. J., in Chisholm *v.* Georgia, 2 Dallas, 470. "The people, in their collective capacity, established the present Constitution." Cooley, Constitutional Limitations, 5, note, citing the passage containing this, adds that this point is forcibly put and elaborated in Texas *v.* White, 7 Wall. 724. On this see also Pomeroy, Const. Law, 8d ed. § 762.

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torical, has been that collected by Judge Story in his Commentaries. Book III. Ch. 8.[1]

But the value, as testimony, of any such earlier recognitions of *the people*, as a personality holding all sovereignty as a unit, may be learned quite as much from what the distinguished jurists and statesmen, there cited, did *not* show, as from their several, often inharmonious, affirmations.[2]

Even from the elaborate argument made by Judge Story, attributing the Constitution to the will of *the people*, as distinguished from the will of *the States*, it can only be conjectured whether he himself understood the words "we, the people," in the written Constitution, as meaning the inhabitants of the country, as one mass of population; or *the people*, — as the aggregate of the several masses of population in each State, each regarded, without reference to internal political organization, as a severally willing and consenting constituent by the voice of the majority; or *the people*, as the aggregate of the several bodies of voters in each State; each constituting a severally willing and consenting corporate body, under their several organic laws.[3]

[1] I here take for granted that those who would support this position would cite Story as chief authority; judging only from the reference so generally made of late in political discussion. I here allow, for purpose of argument, that Story took this view. I do not undertake to say whether he did, or only that view which I have tried to describe in paragraph VII. or paragraph VIII.

[2] The same inference against their statements applies to the same authorities, so far as they recognized "the people" as holding only those powers of sovereignty which were to be exercised by the national government according to paragraph VII. or VIII.

[3] The argument from the use of the *word* "people" in the Constitution, illustrates the mistake [denied by Pomeroy, Const. L § 18?] in looking at the question from the lawyer's point of view; that is, starting with a document to be interpreted; as by Story (see Comm. § 365), and, as was illustrated by Mr. Webster, replying to Hayne: — "Here is a law, then, which is declared to be supreme; and here is a power established, which is to interpret that law. Now, Sir, how does the gentleman meet this? Suppose the

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The Failure in the Authorities.

However numerous or individually positive may have been those advancing this doctrine of sovereignty in the nation or "the people," it is to be noticed that no one had ever pretended to specify a time in the *history* of the country when political power was *visibly* exercised by any persons other than those personally delegated by the organized political people of the several States;[1] that is, delegated in some election, by some certain known natural persons, who could be individually discriminated from the mass of the inhabitants, as having the elective franchise in and for their respective States, and having it only because it had been conferred on them by such State, or by the body of voters in their corporate capacity, and as by the right or power of that capacity.

No one disputed that the governments which succeeded the colonial were established by the will of the electors or freemen of the colonies, and that no such exercise of the

Constitution to be a compact, yet here are its terms; and how does the gentleman get rid of them? He cannot argue the *seal off the bond*, nor the words out of the instrument. Here they are, what answer does he give them? . . . I show him the grant. I turn him to the very words. I show him that the laws of Congress are made supreme," &c. Webster's Works, iii. 345. The question is not of *interpretation* of the word *people*, as a *legal* question. It is to identify those who used the pronoun WE, as a *political* question. All the interpretations cited by Story are as nothing against the simple fact that the Constitution was accepted by the majority vote of the legal voters in each State. Those interpretations appear to have originated in the apprehensions of those who wished to have the States plainly declared independent confederating parties. See Story's Comm. § 358, and note of original authorities. Mr. Madison, who has been constantly cited of late as sustaining that interpretation, did not rest on this word at all. See Brownson's Am. Rep. p. 224.

[1] That is, by the electoral people in each State, *represented* in convention as the political people in such State. There is no foundation in any theory, or by any argument, nor in intelligent conception, for the assertion that, in such convention, it is not they who act, exercising their own volition, as such political people, but an entirely different personality, of which they, as individuals, are only a fractional part; that is, a mass of people within certain geographical limits, without regard to political organization, corporate existence, and personal franchise; an idea recently taken up and enlarged by Judge Jameson and by Professor Pomeroy.

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will of the mass of the inhabitants, even of a single colony, much less of all, as one nation, ever established those freemen or electors as the representatives of the mass.

No one disputed that the Constitution of the United States became law only after the politically organized people of the States voted for it in their respective States, according to their own State laws determining the individual voters.[1]

No one had told of a time when the inhabitants, indiscriminately and without regard to these State laws, made

[1] 1 Kent, 225: — "The plan was submitted to a convention of delegates, chosen by the people at large in each State, for assent and ratification." "People at large;" this is a false term of description for designating those who, in each State, then held the elective franchise and who alone voted. The people at large in each State, meaning the whole mass of inhabitants in each State, did *not* choose the delegates. "Such a measure was laying the foundations of the fabric of our national policy where alone they ought to be laid, — on the broad consent of the people." This is true only on the supposition that the voters in each State, deriving their franchise from the State as an existing political being, constituted "the people" who could give a "broad consent."

"It is true that the consent of the people was given by the inhabitants voting in each State;" this, again, is untruth. "The inhabitants," generally, did not vote; only a small portion of the inhabitants; "but in what conceivable way could the people of the whole country have voted? 'They assembled in the several States,' said Story, 'but where else could they assemble?'" Nobody is called upon to show *where* or *how* they could. It was for Story and Kent to show that *they* did. Those who make the assertion are bound to show how "the people of the whole country" could be doing any thing, because certain persons, who were not "the people of the whole country" (unless the voters in each State were "the people of the whole country"), were doing something. From our implicit faith in the honesty and patriotism of these jurists, we have been accustomed to read their statements of history without reflection, and it may be believed that they themselves, under truest patriotic feeling, really thought that this was reasoning, and not a recklessness of statement which would not be tolerated in ordinary matters and from ordinary men. The whole of this argumentative presentment of the material facts, whether offered for argument or for history, rests on the assumption that a certain body of persons, who are called *the people* in one sense, are identical with an entirely different body of persons, also called *the people*, in an entirely different sense.

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known the Constitution of the United States as their expressed will, with the purpose to bind in union the States then existing or thereafter to exist.

No one denied that, if the written Constitution was to be amended, the organized political people of the States, holding the franchise of voting under State law, would, by their legislatures or in convention, vote in each State and for each State, as the people of those States, and that the people of the whole country, as a mass of millions, would have no more to do about it, politically, than the inhabitants of Central Asia; and could not have any thing to do about it, unless by a revolution.

On this matter, regarded as a simple historical fact, there never has been, and is not now, the slightest difference of statement between the advocates and the opponents of the doctrine of secession.[1]

But, in the mere statement of these things, there is recognition of the fact that sovereignty, that is, the supreme function in making law,[2] had never been held by *the people* or by *the nation*, except as the politically organized people of the several States are such *people*[3] or *nation;* and that when, as matter of undisputed fact, the words "WE, the people," &c., were declared in the Constitution by the majority vote of each politically organized electoral people of the several States, *they* asserted that *they*, being so organized, were "the people" from whom the Constitution was to derive its authority, and did not thereby declare that some other persons, viz., the mass of the inhabitants, or the nation without regard to organization, were the persons then speaking and designating *themselves*

[1] See this illustrated even by Story in his strained interpretation of Madison's plain language. Comm. § 365.

[2] "Die Souveränetät der Gesetzgebung," *ante*, p. 97.

[3] Which is the sense in which Mr. Madison spoke of "the people."

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as those to whom the authority of the Constitution should be ascribed.[1]

The people, or *the nation*, holding sovereignty, as distinct from the States, or the politically organized people of the States, was, therefore, not even a myth; unless there can be a myth without any mythical history.

It can hardly be pretended by any one, that all who, before 1861, denied the right of State secession, and all who, during the war, supported the general government in resisting the separation of the eleven Southern States from the Union, must have recognized such an investiture of sovereignty in *the nation* or *the people*, independently of any organization of the States, or of the political people of the several States.

But there may be ground for saying that some such assertion of the location of sovereign power has been insisted on, towards the close of the war especially, and in and since the reconstruction era,[2] by a large proportion of those writers and speakers who, in or out of Congress, have sustained the several administrations of the general government.

Yet those who, at any period of our history, have been most elaborate in their assertions of such an origin for the Constitution, have never agreed in distinguishing the personality on whose will it is supposed to rest, except by such

[1] This assumption, about a matter of historical fact, is the corner-stone of the argument with the far greater part of writers who have supported the policy of Congress in the reconstruction period, and had been that of all the school of Story and Webster. (Story, Comm. § 363.) The assertion of the existence of such a *people*, without the slightest attempt to explain the facts of history, is the basis of Mr. Webster's argument in reply to Hayne, Webster's Works, iii. 321, 322, and forms the bulk of his speech on Mr. Calhoun's resolutions, Feb. 16, 1833, printed in same volume, 448, under the title *The Constitution not a compact between sovereign States*, which, as a proposition, may be perfectly true, and may be established without any perversion of the historical record.

[2] For illustrations, compare speeches in Congress collected in Wilson's History of Reconstruction.

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terms as *the union*, *the United States*, *the nation*, *the people*, as being all equally applicable and descriptive. It might be supposed that the matter was and is a question of transcendental philosophy, instead of one of fact, to be settled by ordinary evidence. For, so far as the discrimination of *the people* or *the nation* as a political entity has been attempted, it has been by setting up a metaphysical hypothesis generated out of the social-compact theory and the abstract propositions of the Declaration of Independence, which has gained a new hold on the imagination by a feeling of the necessity for finding some one personality, or one aggregate of personalities, holding sovereignty as a unit, to whom the authority of the Constitution *as law* should be ascribed.[1]

It is by reason of our general failure to discover in our history any such one political personality, or one aggregate of personalities, that the absurdity that all political power in this country exists by virtue of a certain paper document, either with or without a *people*, or a *nation*, or a *union*, or a *United States*, existing in the mind's eye, independently of the politically organized States, — the absurdity which had been cherished, nurtured, and developed in the school of Webster and Story, — has long been received

[1] I assume, from the nature of all discussions on these subjects, that I need feel no hesitation in indicating Judge Jameson, Judge Cooley, and Professor Pomeroy, as authors who, as I understand their writings, have recently illustrated this statement. Compare Jameson's Const. Convention, ch. ii., particularly § 51; Cooley's Const. Limit. pp. 5, 6; Pomeroy's Const. Law, §§ 4–12, which the author gives as substantially taken from Falck's Juristische Encyclopädie, and ib. §§ 36–39. By citing the authority of Falck, who was writing, I suppose, without reference to any particular country, Mr. Pomeroy makes it more distinct that he accepts an hypothesis in the place which a fact alone is adequate to fill. If Falck postulates the possession of sovereignty by every congeries of thousands or millions called *a nation*, as a fact which is the fact at all times, and in all countries, — in Germany, Russia, Burmah, America, or elsewhere, — it is a fact in which I do not take the slightest interest. If these writers understand by *sovereignty* something which is held in this way, then the thing whose possessors in this country I wish to ascertain must be something else.

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as the only possible refuge[1] from that doctrine of State sovereignty which, while involving the right of peaceable secession, was at least simple, consistent, and intelligible. And it is from the continuance of the same general failure that the same absurdity has been put forth with new iteration by Presidents, by Congresses, by judiciaries, and by "loyal" people, as justifying the action of the government in suppressing the Rebellion, and still reappears, from time to time, in cases before the Supreme Court, as giving the key to the questions of law which have arisen out of the same event.

[1] Mr. G. T. Curtis, Life of Webster, i. p. 859, "It has been said that Mr. Webster needed no preparation to answer the heresy of nullification. In one sense this is true. From his first entrance into public life, he had been familiar with the historical facts on which any true theory respecting the nature of the Constitution of the United States must be based. His opinions on the subject had been formed long before the crisis of 1830–33 had arisen; and, if it is to be suggested that those opinions were such as were usually held by the best minds in New England, it is to be remembered that they constitute the sole ground on which the supremacy, claimed by the Constitution as the supreme law of the land, can be maintained."

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CHAPTER IV.

THE WEAKNESS IN THEORIES FOUNDED ON THE SEVERAL POSSESSION OF SOVEREIGNTY BY THE ORIGINAL STATES. — HISTORICAL REVIEW OF NATIONAL AND STATE EXISTENCE FROM THE COLONIAL ERA TO THE ADOPTION OF THE WRITTEN CONSTITUTION.

IF the statement, commonly accepted, of the independent existence of the States, from the end of the colonial period to the beginning of that which is marked by the adoption of the Constitution [1] of 1787, is historically true, the doctrine, as to the effect of that transaction, which is commonly set up in opposition to that of States-rights, has no reasonable foundation.

In the argument to support that doctrine there is this fallacy; that the arrangement, whether called contract, compact, league, grant, or cession, is placed before the mind under the conditions of a contract, compact, league, grant, or cession, under municipal law.[2]

When Doe and Roe make a contract, &c., each is *bound* because he may be *compelled* to fulfil its conditions. But this arises from the circumstance that Doe and Roe are not the only persons concerned with the contract, &c., to which they are the parties. There is a third, and very much interested, person — the civil power, or, in more plain and direct terms, some sovereign-power holder, to whom they are both subject, whether they choose it or not, who gives the contract its binding force, by having the power and the intention to compel the fulfilment of its conditions.

[1] *Ante*, p. 99. I.

[2] Madison in his letter to Rives, Writings, iv. 290, — "It is asked whether a State, by resuming the sovereign form in which it entered the union, may not of right withdraw from it at will. As this is a simple question, whether a State more than an individual has a right to violate its engagements, it would seem that it might be safely left to answer itself."

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Hence it has legal force, that is, it is enforceable at the will of either party against the other, without reference to their individual strength. There is no "wager of battle," no "appeal to the supreme arbitrament of war," &c., for Doe against Roe, or for Roe against Doe. That may be a very good thing in itself; but, as the case stands, they simply must not do it. But it is not efficacious, or valid, or operative by moral force alone, without, that is to say, the interested co-operation of that third person.

But, when independent States or sovereigns make their contracts, &c., there is no such third person concerned. There is no third will and force to coerce either of the two contracting parties. There are only the two, and the force and will of the one and the force and will of the other are the only elements, if the result of the compact is to be determined by force and will.

In the case of the Constitution of the United States, the Government of the United States is not such a third person, either as a whole or in any of its separate functionaries; because, under the assumed condition of things,[1] it is itself only the result of the contract, compact, league, grant, or cession; did not exist before it, and cannot exist independently of it. A nation, or the nation, or a people, or the people, or something distinct from the government and from the nation, and from the people, and called *The United States*, is not such a third person; because, under the assumed condition of things, there was no political nation, or people, and no such United States, when the contract, &c., was made, and there has been none since; except as such a thing exists by the contract, &c., as its subject-matter.[2]

[1] The premises equally accepted by Calhoun and Webster in 1838. Brownson, Am. Rep. 195.

[2] It is this which is the trouble with Mr. Webster's argument. See Brownson, Am. Rep. 192–196.

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In the case of Doe and Roe's contract, their several wills acted in its making only, and so were facts on which *the law*, that is, the measure of justice enforced by the will of their political superior, acted to sustain the relation between the parties according to the terms to which they had voluntarily assented. But, in the case of treaty-compact between sovereigns, their several wills must act, not merely in its making, but to sustain its continued existence.[1] The stream cannot rise higher than its source; the creature cannot be stronger than the creator. International law does not control independent States as municipal law controls natural persons.

If the Constitution began in contract, compact, league, grant, or cession, in which the States were parties, as severally independent sovereigns, the several will of each State has been necessary for its continuance, as far as such State has been concerned, as much since, as at the moment of its adoption. Each had the capacity and the right, in the sense of capacity, to change its mind and repudiate it the next day; and at any time afterwards, as well.[2]

[1] See Pomeroy, Const. Law, p. 39, note, that "this doctrine, that a sovereign state cannot bind itself by any treaty or compact by which its sovereignty is wholly or substantially surrendered or lessened, is now maintained by the leading writers on Public and International Law," citing several European authorities.

In Mr. Webster's argument with Mr. Hayne, after the passage cited, *ante*, p. 109, note, he proceeded to say of his opponent: "Instead of answering this, he retreats into the general reflection, that it must result *from the nature of things*, that the States, being parties, must judge for themselves." Webster's Works, iii. 345. But this "general reflection" — the application of an axiom — was fully adequate to overthrow Mr. Webster's interpretation-argument; that is, on the assumption, which he had accepted, that the States had been severally sovereign before the adoption of the Constitution. See also Brownson, Am. Rep. 240, 242.

[2] Brownson, Am. Rep. 196.

Mr. Pomeroy, in Const. Law, § 54, relies on the position that the revolution "left a united mass, a political entity, a nation possessing the high attributes of sovereignty which it had just exercised. The United States was then a fact, and no power but that which called it into being — the

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Doubtless, there may be irrevocable transfers of the powers incidental to an independent political body, or personality.[1] Whether *any* can be truly transferred, unless *all* are transferred, is a different question. But, in any event, the transfer can only be made where there is some natural person or persons in actual being, who is, or who are capable of receiving and holding those powers, as they had been held by the former possessor. In the case of the Constitution, whether called contract, compact, league, grant, or cession, there was no such person in being to take the powers supposed to be transferred, and the officials elected or appointed as instruments of those powers are not made such a person, by being, collectively, the government of the United States.

The common orthodoxy may assert that the very object, operation, and effect of this transaction (by whatever name called) was to bring into life and continued being a personality thus capable of receiving the powers which passed out of the States at the time, — a distinct person, that is, from the several States whose action made such person; and one who may be properly called *the United States*, or *the Union;* although, as far as any thing can be learned from the name, and as far as can possibly appear to the eyes of the rest of the world, *the United States* and *the several States united* are identical; that is, if the common notion is correct, that there can be no *union* except as there are some individuals to be united.

According to this idea, the several States by this trans-

People — is competent to decree the national destruction." And he frankly says, ib. § 55: "Grant that, in the beginning, the several States were, in any true sense, independent sovereignties, and I see no escape from the extreme positions reached by Mr. Calhoun." See also ib. § 56.

[1] Brownson, Am. Rep. 194. "That a nation may voluntarily cede its sovereignty is frankly admitted, but it can cede it only to something or somebody actually existing, for to cede to nothing and not to cede is one and the same thing."

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action merged a portion of themselves into a common single existence; the existence called *the Union*, or *the United States*. So that it would appear that according to this idea, and strictly speaking, the several States are not parts of the United States.[1]

This idea involves the doctrine of the divisibility of sovereignty, or of the sum of sovereign powers, which I have herein *assumed* to be a thing impossible.[2]

In the case of natural persons living under municipal law, it is possible for them individually to give up a portion of the rights, means, capacities, powers, &c., belonging to each, severally, under the guarantees of such municipal law, and, by so doing, form a league, association, corporation, or partnership, which shall exercise the contributed rights, &c., of each, while they, personally, still continue mutually independent in the possession and exercise of other rights, means, capacities, powers, &c., equally belonging to them, severally, under the guarantees of such municipal law.

But, in this case, the co-operating law, the will of the third party, the law-giving will of the sovereign, sustains

[1] Reading the history, as I have, I could not accept as correct Dr. Woolsey's judgment, Pol. Science, ii. p. 251. "It is a great pity that the confederation and the revolution fastened on us the name United States, although it expresses a reality; for it has ever been played false with, as if there were not something greater and higher than the separate States created by the Constitution. And the word sovereignty, which is used in the articles of Confederation and in the Treaty of Peace of 1783, as a quality pertaining to the States, is no longer applicable to them within the Union, and is carefully avoided in the present Constitution. It has 'paltered with us in a double sense' as if there could be two sovereigns, one without any international powers, and many other properties essential to a true State, the other with these in full tale." Yet I accept the sentence immediately preceding this quotation: "So that the United States are the only true State, and its sovereignty the only true sovereignty." Also, the sentence which follows the same quotation: "It is a State formed by a Union without merging the existence of the members in that which they created;" because I regard the United States and the States united, as identical.

[2] See *ante*, p. 106. This will be further considered in Chapter VII.

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this division of these rights, powers, &c., belonging to each individual person; and if a new being can be said to exist, in this case, holding these ceded powers, its existence depends upon the co-operating law.

Whenever a real transfer of sovereign power may actually have taken place, the transaction does not have the nature of contract, grant, or cession.[1] Always, in fact, and generally, in appearance, it depends on force. The possession of independent political power is always matter of fact, or what is proved by history; and never matter of right, or what is proved by law. Because it is itself the fact upon which the law is dependent; and contract, grant, or cession must be dependent on law.

If the several sovereignty of the States, before the transaction, is assumed, the nature of the transaction must be the same whether called contract, or league, or cession, or grant, or any thing else.

It might be admitted that the State *governments* had not received from the political people of the several States the authority to decide for them, on the adoption of the Constitution. But the argument for the indissoluble nature of the contract, or irrevocable nature of the grant, is not bettered by regarding it as the act of the people of each State, in distinction from the State governments;[2] that is, on the supposition that the people of each State possessed independent sovereignty, either as a mass of population, or as an organic people.

The tenacity with which this view has been held is due to a lingering faith in the historic possibility of a social compact, according to the common political theory of the last century.[3] It was supposed that the authority of each

[1] Phillimore, Int. Law, Part ii. ch. 6.

[2] On which Mr. Madison and others have laid great stress. See Madison's letter to Mr. Everett, Madison's Writings (Compare Brownson, Am. Rep. 231); Story's Comm. § 362; Webster's Works, iii. 346.

[3] Brownson, Am. Rep. 230, 239; Von Holst, i. 80.

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State, or of the organized political people of each State, had actually come about by a cession from each individual person of a portion of his inherent personal sovereignty.[1] With some, the idea has been that afterwards, in like manner, these States ceded to the constituted Government, or to the persons called *the Union — the United States*, a portion of the sovereignty thus acquired; and that, as natural persons were, by the theory, *bound* in the social compact to form a State, so the States are supposed to be *bound*, in the secondary compact, to form the United States. The States also are supposed to reserve some of their powers, as, in the original social compact, the individual man, or woman, or child, reserved certain rights.[2]

The simple statement of the theory ought to be enough to shatter all that has been built on it. It is an idol that has been ground to powder so often that it seems useless to argue about it now, if anybody still believes in it.

The historical basis of the original sovereignty of thirteen States being accepted, — those who in the name of State-rights have maintained the right of peaceable secession are fully justified in charging their opponents with offering, in the place of argument, nothing better than mere assertion of the indissoluble nature of the compact, league, grant, cession, or whatever else it may be called.

[1] See Preamble to the Constitution of Massachusetts, ascribed to John Adams. Even Hamilton said: "That portion of sovereignty to which each individual is entitled can never be too highly prized." Works, ii. p. 315.

[2] Mr. Madison's idea, as I understand from his letter to Mr. Everett, was that, whoever may have been the grantee, the grant at the adoption of the Constitution was made by each natural person. The theory being that, on that occasion, the older social compact, by which the States had been created at the Revolution, was dissolved; by whose consent is not stated. Each natural person recalled his supposed former grant of sovereign power, and made a new cession; giving part to the United States, or the people, or nation, or government; another part to the State of which he was inhabitant, and reserving part to himself. A similar idea appears in Chief Justice Jay's opinion in Chisholm *v.* Georgia, 2 Dallas, 471, cited as authority in Story's Comm. § 849, and in Story's own argument, ib. § 840.

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Who were the People, in the Revolution.

But it is contrary to the facts to suppose that, at any time since the separation of the thirteen colonies from the Empire of Great Britain, a corresponding number of States have existed in their places; each possessing, in severalty, the sum of sovereign powers belonging to every independent state or nation, and capable of severally ceding all, or a portion of those powers to any person who might be capable of receiving them.

It is contrary to the facts to suppose that thirteen colonial *governments* acquired, each for itself, within its original jurisdiction, any of those powers which the imperial government had before exercised therein, or, generally, that they acquired any sovereign rights whatever.

It is equally contrary to the facts to suppose that those colonies were resolved into a mere aggregate of natural persons, without political organization, who then, according to some "law of nature," formed themselves by "social compact" into new political bodies.

In each colony "the freemen" or electors had always had a primal corporeity, by individually uniting the common national character of British subjects and the local character of constituent members of a provincial or chartered colony. The existence of such a political people underlaid all colonial political action. It was ordinarily manifested for municipal and provincial objects, either directly or through elected representatives. But the same persons had always claimed a right to act, in the same corporeity, for national objects, as political members of the British Empire. This claim, in a variety of forms, was the very basis of the difficulties with the British government.

In the revolution, this claim developed into that combined action of the political peoples of the several colonies which we call *the Revolution;* so that their national existence, as one political people claiming sovereignty, coincided

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with their several self-government as States.[1] Political independence, or the possession of sovereign power, is a fact determined by manifestation of force or power to hold sovereignty, or to be independent. There is no legal right in the matter; and, if any moral right is distinguishable, it is entirely barren of political consequences. Here, the might makes the right.[2] In the case of the American republic the force was in the national corporeity in which the political people of each colony was a constituent. Severally, the colonies had no force adequate to sustain either local or external sovereignty or independence.

It was the political peoples of the colonies, acting in union as one political personality, which, being the actual possessor of the sovereign power to make law, did, as lawmaker, determine every thing which could be the object of legal knowlege, including the written constitution itself. But this possession of sovereign power by this political people, thus composed, is, of course, an object of political knowledge as distinguished from legal knowledge, and, as such, may in a certain sense be termed the actual constitution of the nation.[3]

[1] By the statements to be made in this chapter, I would reject as utterly false, the idea which some have set up that the political existence of the several States was *usurpation* as against *the people* of the whole thirteen colonies regarded as a mass of individuals; an idea first broached apparently by J. Q. Adams: "Where then did each State get the sovereignty, freedom, and independence which the articles of confederation declare it retains? not from the whole people of the whole Union, not from the Declaration of Independence, not from the people of the State itself. It was assumed by agreement between the legislatures of the several States and their delegates in Congress, without authority from, or consultation with, the people at all." Discourse on the Constitution, p. 19. Perhaps Mr. Adams only meant to question a claim of the organized State *governments* to be the possessors of supreme power. Compare Von Holst, vol. i. p. 22, and the notes. But the same idea of usurpation was more fully asserted in the Princeton Review, October, 1861, by J. H. McIlvaine, D.D., Professor of Political Science, cited by Mr. Pomeroy in his Const. Law, p. 43, with the remark: "The foregoing language is entirely correct."

[2] Brownson, Am. Rep. 201.

[3] Brownson, Am. Rep. 218. "The Constitution of the United States is

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The Political People not changed in the Revolution.

But the integral existence of the political people of each colony was not interrupted. It was this people of a colony or State which, as the integer, participated, in the combined possession of sovereignty, with the integral people of each other colony or State.

The individual natural persons never held sovereign power. Individual natural persons never can, except as a corporation sole; like a king or absolute monarch. The local governments which had been the depositaries of the power of the crown as well as of that of the colony, continued only so far as they became the representative instruments of such a political people.

The colonial corporeities were all included under one empire, and the colonists, as to each other, were all of one political national state, over which all sovereign powers, not exercised by the local governments, if these governments had any that could be called such, were exercised by the single undivided authority of the crown and parliament. Their relative position was not changed when they were jointly separated from the rest of the British Empire; when the political peoples of these States united exercised sovereignty as a unit, by maintaining, in union, all the power before exercised by the local governments, and by the crown and parliament.[1]

twofold, written and unwritten, the constitution of the people and the constitution of the government. The written constitution is simply a law ordained by the nation or people instituting and organizing the government; the unwritten constitution is the real or actual constitution of the people as a state or sovereign community, and constituting them such or such a state. It is Providential, not made by the nation, but born with it. The written constitution is made and ordained by the sovereign power, and presupposes that power as already existing and constituted."

[1] But I recognize *no history* in a statement like this: "The States were always, in respect to the higher powers of sovereignty, subject to the control of a central power." Cooley's Const. Limitations, p. 6. Or like this: "The Congress of 1775 assumed those powers which had been exercised by the crown and parliament" (ib.), if the meaning is that the Congress was a "central power," a person holding these powers independently of the States which elected and sent the deputies who constituted the Congress. To be

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When this occurred, the powers which before had been severally exercised by the colonial governments continued, as a general rule, to be severally administered by new organs of the political people of each State; while that people, in union with those of the other States, and by another organ, more or less perfectly adjusted to circumstances, administered other powers; some of which had, but more had not, been exercised by the colonial governments.

Thus the united political people of the colonies, both in internal and external relations, presented themselves with all other inhabitants of the same territory as a sovereign nation, — the United States of America, among other nations.

The political people of the colonies could not have acted at all, or, to change the form of expression, the people of the colonies could not have acted politically at all, except as they were already organized by law.[1] Their individual political capacity was not a quality inherent or primordial, as the right of all natural persons. The colonists, individually, had no political capacity as a quality inherent in each; either as the right of all natural persons, or as the right of all British subjects. They held it as members of the corporate bodies which we call *the States*. It was therefore the political peoples of the several States, as so many integral personalities, who thus, in union and not otherwise, had primordial existence as an aggregate of personalities holding sovereignty as a unit.

It was then of necessity that, in exercising sovereign powers for national objects, the political people should be known only as existing in those primary political unities

such a power-holder the characteristic of *continuity* must exist, which does exist in the case of the political people of the States, but cannot in the case of any governing body which depends for renewal on election of its members by somebody else.

[1] Woolsey, Pol. Science, § 75, on the question "What is the people?"

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which we call *the States*, identical with those which, for local objects, or for instituting *State* government, exercised, in severalty, the residue of sovereign powers belonging to the same people.[1]

This doctrine as to the investiture of sovereignty in the organic political people, as distinguished from the people as a mass of population without reference to organization, has been thought untenable by some,[2] and the opposite has been very decidedly affirmed by several recent writers on our public law; some regarding such organic people as only representatives of the people considered as a mass of inhabitants.[3]

There is an intrinsic difficulty in giving sufficiently clear expression to any views on these political questions, which arises, mainly, from the ambiguity of all words conveying abstract ideas. Mr. Pomeroy, in his Introduction to the Constitutional Law of the United States, § 29, has done me the honor to mention me as having, in a work published in 1858, sustained, together with Dr. Brownson and Mr. George P. Marsh, a view of the investiture of sovereignty in the "people of the United States," which he has fully stated in § 28 of his work, and of which he says, ib. § 29, that "this, in substance, is the view of the Constitution advocated by Hamilton, by Jay, by Marshall, by Story,

[1] Brownson, Am. Rep. 222. "The States severally simply continue the colonial organizations, and united they hold the sovereignty that was originally in the mother country. But, if one people, they are one people existing in distinct State organizations, as before Independence they were one people existing in distinct colonial organizations. This is the original, the unwritten, and providential Constitution of the people of the United States."

[2] See Jameson's Const. Convention, p. 68.

[3] See, particularly, *ante*, p. 114 note, and the whole of Chapter II. of Jameson's Constitutional Convention, as an elaborate and impartial review of opinions on the question. Pomeroy's Const. Law, § 8, says, not in the government, "nor in the body of electors who immediately choose, but in the total aggregate of persons who are members of the State, and who, by the present constituted order of things, are primarily represented by the existing body of electors, and ultimately by the legislative and executive officers."

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by Webster, and upheld by the judgments of the Supreme Court during its earliest years." I should, for my own part, hesitate to accept the position attributed to me, as I have been quite unable to learn what view these eminent authorities did hold on this subject. Besides, as far as I understand Professor Pomeroy's statement of this view, especially as further explained in other parts of the same work, it is fundamentally different from that which, I think, was very clearly stated by Dr. Brownson, and certainly does not at all correspond with that which I had intended to maintain in the work referred to; though it may agree with that of Mr. Marsh.

It would appear, however, that Judge Jameson had not had the like understanding of either Dr. Brownson's language or my own.[1]

The distinction here made — between *the people*, as a mass of individuals living in one national domain, and *the people*, as those individuals who visibly act in corporate political life, through constitutions depending on their votes — may seem to many persons more metaphysical than political, and, at any rate, without any practical consequences, if it be once admitted that, in either case, there is *a people* of the United States holding the total of sovereign power. More or less disagreement on this point has existed from a very early period, though the distinction may not have been, hitherto, very clearly drawn. It is true that the distinction may have no direct bearing on the question of State sovereignty, as opposed to the sovereignty of the United States. The advocates and the opponents of "State-Rights" could not be discriminated by their difference on this subject. The definition which Chase, C. J., in Texas *v.* White, *ante*, p. 10, note, cited from Penhallow *v.* Doane, by mistake, as that of Paterson, J., occurs in the opinion given in that case by

[1] Compare Jameson's Const. Convention, §§ 60, 61.

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Iredell, J. (of South Carolina), who, in Chisholm *v.* Georgia, held that the State, as a sovereign, could not be sued. It was the prevailing doctrine of the time, together with that of the social compact, of which, indeed, it was only one form. This may be seen by all the opinions delivered in this last-named case, and especially in that of Judge Wilson, which is one of the standard citations for this idea.

I may, further on, be able to show that the distinction has results of widely-reaching practical importance; agreeing as I do with Dr. Brownson on this point, generally, and in the truth of the following, from his "American Republic," p. 10: —

"But American statesmen have studied the constitutions of other States more than that of their own, and have succeeded in obscuring the American system in the minds of the people, and giving them in its place pure and simple democracy, which is its false development, or corruption. Under the influence of this false development the people were fast losing sight of the political truth, that, though the people are sovereign, it is the organic, not the inorganic people, the territorial people, not the people as simple population, and were beginning to assert the absolute God-given right of the majority to govern. All the changes made in the bosom of the States themselves have consisted in removing all obstacles to the irresponsible will of the majority, leaving minorities and individuals at their mercy. This tendency to a centralized democracy had more to do with provoking secession and rebellion than the anti-slavery sentiments of the Northern, Central, and Western States."[1]

I assume here that the question is, of necessity, a question of fact: Who were those who did actually exercise the

[1] See also Brownson's statement of the foundation of the general doctrine of the sovereignty of the people. Am. Rep. pp. 71–77.

On reading Mr. Pomeroy's citation of Dr. Brownson as having concurred in his own view, I must confess a doubt as to the power of language to convey ideas on this subject.

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power? And it is in this way that Madison presented it (Madison's Writings, iv. 203): "It is fortunate when disputed theories can be decided by undisputed facts. And here the undisputed fact is that the Constitution was made by the people, but as embodied into the several States which were parties to it, and therefore made by the States in their highest authoritative capacity. . . . The Constitution of the United States being established by a competent authority, by that of the sovereign people of the several States who were parties to it," &c.

This *fact*, attested by undisputed history, could not have been put out of existence by any *words* in the articles of Confederation or in the Constitution. These documents might have contained express averments that each State was severally and intrinsically sovereign and independent; or others, that all sovereign power was vested in the inhabitants as so many millions. But in face of the facts, as they actually occurred, these statements would have been empty wind.

American writers who had followed Burlamaqui and Vattel in thinking that they must refer all legitimate government to a contribution by each natural person of a sufficient portion of his or her inborn, inherent sovereignty, were accustomed to find in the State *governments* and the general *government* the recipients of this contribution from the inhabitants of the United States. But, if there has ever been any such contribution here, the recipient was the political people of the States, being united. It is they who correspond to *the governments* of the older writers.

This political people was the supreme-power holder, by the grace of God, if one chooses to say so; by the "providential constitution," as Mr. Brownson called it; or by the malice and device of the devil, if any one prefers to look that way for a beginning;[1] or by "legitimate usurpation,"

[1] As may very likely be the opinion of some *ultra* Ultramontanists;

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as some might say; or simply, as I say, by fact, because so it was, and there is no rubbing it out.

This people only delegated its power to the governments, State or national, and was the sovereign still. These governments existed only by the continuing will of this people.

Prior to the adoption of the Constitution, there were periods when the existing governments were not formally adjusted to the actual possession of supreme power. But it would have been more of an anomaly if this had not occurred during a revolutionary period. The non-existence at any particular time of a government holding all the powers afterwards deemed essential, in external and internal relations, for general or common interests; or the fact that, at certain times, the State governments were required to co-operate in order that some of those powers should be exerted, would not show that all or any sovereign power was then held, in severalty, by the States.

The action of conventions in each State convoked with special reference to co-operation in the formation of a general government, and their consenting or non-consenting at certain times, does not show that the States *severally* possessed powers which they could cede or withhold. Nor does the fact that there were times when certain States had not co-operated in the government which represented the powers directed to and held for common and general objects, show that the people of those States were not then a constituent portion of the political people of the United States.

as perhaps it was of Count Joseph De Maistre, author of the well-known Essay on the Generative Principle of Political Constitutions. The ascription of the American Constitution to the special intervention of the Deity has been very common in our legal literature. It may be as well for us to remember that there have been and still are godly people in the world who believe that all popular governments, and even all which do not recognize some royal dynasty by divine right, are illegitimate and sacrilegious.

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Majority Rule not Applicable.

The whole period, until the full adoption of the Constitution, was abnormal in the relation of the form of government to the possession of the sovereign power.

In the adoption of successive governments for general political action, each State consented without reference to any relation between a majority and a minority of States; because the autonomic action of the people of the United States is determined by the several wills of the integral people of each State, and these several wills could not be controlled by any rule of law, being autonomic. The will of no State was determined by the action of a majority of all the States; yet, except as one of the *United States*, no State had any such will.

The will of the whole number is known from the action of the majority only when the whole number are *under* law. In this instance the whole number, collectively, were above law; therefore, the majority rule did not apply. But this does not show that, as argued by Madison in the Federalist,[1] and by others, each State in consenting to these successive general governments was acting as possessor, in severalty, of the sum of sovereign power, and agreeing for a federal agent of government.

The possession of sovereign power by the people of the States only as associated or united States is not disproved by the fact that the government, under the Constitution of 1789, went into operation when only nine States had ratified the instrument. It cannot be inferred that one or more several States might, in accordance with the then existing location of sovereignty, have set up for an alien government.[2] It would even then have been only a ques-

[1] Federalist, No. 89; Calhoun's Works, i. p. 150, 151.

[2] Judge Cooley, in Constitutional Limitations, p. 9, says: "Without, therefore, discussing or even designing to allude to any abstract theories as to the precise position and actual power of the several States at the time of forming the present constitution (notes this as being discussed in Gibbons v. Ogden, 9 Wheat. 1), it may be said of them generally, that they have at

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tion of power, physical power; the only fact determining the possession of sovereign power in absolutely separate existence. Such a separation of a State, after the colonies had established, *as States in union*, their independence in respect to the British Empire, would have been revolutionary secession, as to the other States, being in union.[1]

The fact that, even before all had co-operated in the government under the Constitution, no State severally exerted the powers delegated by that instrument, is evidence that, except as delegated by the associated peoples of the States, these powers could not be delegated to any body.[2]

all times been subject to some national government, which has exercised control over the subjects of war and peace and other matters pertaining to external sovereignty; and that when the only three States which ever exercised complete sovereignty accepted the Constitution and came into the Union on an equal footing with the other States, they thereby accepted the same relative position to the general government, and divested themselves, permanently, of those national powers which the others had never exercised." These propositions appear to me to stand in self-contradiction, and, so far as they can be reconciled, to be inconsistent with the general theory sustained by the author.

[1] Dr. Woolsey, Pol. Science, ii. p. 249: "And doubtless the other States, if unanimous, would have been justified at such a serious crisis, in crushing the little obstacle to perfect union by war, if that had been the necessary means for the end before them." By stating the matter in this way, Dr. Woolsey presents the dilemma as a question of international right, to be settled by methods adapted to differences between independent nations. It is indeed in this aspect that it is presented by Madison, in No. 43 of the Federalist. He recognized the "delicate nature" of the question, but declined attempting an answer.

Dr. Brownson's view is more consistent (Am. Rep. p. 288): "Hence, if nine States had ratified the Constitution and the other four had stood out and refused to do it, which was within their competency, they would not have been independent sovereign States outside of the Union, but territories under the Union." That is, they had it "within their competency," to withhold co-operation *in government* for an indefinite period; and an obstruction of this sort is incidental to the investiture of sovereignty in any aggregate of personalties like an oligarchy.

[2] "In the treaty of 1783 with Great Britain called *Sovereign States*, which, however, never made a treaty separately with foreign nations, never belonged, in their separate capacity, to the community of nations." Woolsey's Pol. Science, i. p. 204. Foreign nations, at that time, had no occasion to decide for themselves whether the States were severally sovereign, or sover-

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Various Governments under one People.

The Revolutionary or Continental Congress, July 4, 1776, declared the "United Colonies" to be free and independent States, "in the name and by the authority of the good people of these colonies." But the delegates to that Congress, before as well as after the establishment of State governments, had received their appointment from electoral agencies which, in their connection with the people whom they claimed to represent, were very different in the various colonies.[1]

In the government, under the Articles of Confederation, the united political people of the States exercised their power for general national purposes, by the intervention of the same organs by which they exercised power for local or State purposes.[2]

In the government, under the Constitution, the same political people, without a revolution, *i. e.*, without any

eign only in union. But some foreign nations in 1861 were, at least, very near declaring their opinion on this point, by the time and manner of their recognition of the Southern belligerents (*ante*, p. 56), though, as it stands to-day, no foreign nation is committed to any decision. In the second edition (1871) of Sir Robert Phillimore's International Law, i. p. 168, it is said: "The recent civil war between the Southern and Northern States, and the conquest of the latter after a fierce and desperate contest, has not so affected the permanent International relations of the Confederation with Foreign States as to require any special notice in this place. Whether a correct view of the Constitution and of the facts of the case was, or was not, taken by the Southern States, who maintained that they formed part of the Union upon conditions expressed in the terms of the great Charter of the Constitution, and that the violation of them justified their secession; or by the Northern States, who maintained that this secession was unjustifiable in fact, and an act of treason in law; whether the employment of armies by the Northern States to coerce the Southern States, and compel them to remain in an Union which they desired to leave, was, or was not, in accordance with the principle of freedom upon which the United States justified their secession from Great Britain, are not subjects to be discussed even indirectly in this chapter." The author, it will be noticed, uses the term *Confederation* as a proper one for the country in its international relations.

[1] Curtis's Hist. of the Const., i. p. 11, note.

[2] Curtis's Hist. of the Const., i. p. 245; Kent's Comm., i. 208; Journal of Cong., 1775, May.

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shifting of sovereign power,[1] exercised their powers for national purposes by the immediate action, through special representatives, of the political people of each State.

The possession by this "people of the United States" of the powers exerted by a general government, co-existent with the possession by the same people of other powers, exerted by the State governments, continued, in manner and form more or less distinctly recognized, from the time of the Revolution onward; and, prior to the late civil war, no political people or body politic had appeared, on the territory recognized by foreign nations from time to time as belonging to the United States, in any public international relation, except as one of the United States, or been recognized by foreign nations or by any State of the Union as using or holding, in severalty, the powers exerted by the general government. Nor, except as thus being one of the United States, had any such political body used or held independently the residuary powers.[2]

[1] The contrary of this is stated by Taney, C. J., in Dred Scott *v.* Sanford, 19 Howard, 441: "When the present United States came into existence, under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations."

Some would regard the change from the Confederation to the Constitution as essentially revolutionary, as Woolsey, Pol. Science, ii. p. 249, and Cooley, Const. Limitations, p. 8, which it was if, in the adoption of the Constitution, the nation or people as a mass, assumed and exercised sovereign power, or if three States became alien nations, when it was adopted by ten other States, as Judge Cooley presents it.

[2] Brownson, Am. Rep. 221. "The key to the mystery is precisely in this appellation *United States*, which is not the name of the country, for its distinctive name is America, but a name expressive of its political organization. In it there are no sovereign people without States, and no States without union, or that are not *united* States. The term *united* is not part of a proper name, but is simply an adjective qualifying *States*, and has its full and proper sense. Hence, while the sovereignty is and must be in the States, it is in the States united, not in the States severally . . . but there could be no sovereign union without the States, for there is no union where there is nothing united.

"This is not a theory of the Constitution, but the constitutional fact itself. It is the simple historical fact that precedes the law and constitutes the law-making power. . . .

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The power thus held by the people of the United States, being sovereign power, was taken and held by them voluntarily, of autonomic will and choice. Yet that will was not the will of an integral or unitary people, but the will of the combined peoples of the States. The power belonged to them in their union; but the participation of the people of each State was voluntary, as sovereign. They were not, and could not, in the nature of the case, be obliged to participate in the possession of the powers of sovereignty.

By those who hold that each State had a several independent sovereignty, the second of the Articles of Confederation has been much insisted on: — "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation delegated to the United States in Congress assembled."

But the question is, — What was "its sovereignty," &c.? If the States are looked upon as delegating severally, the question still is, — How did they hold the power they could delegate? This declaration could not make the condition of things which existed before it, and which determines the value of the declaration. It is a piece of testimony, to be compared with other existing evidence.

The language or general tenor of the written constitution corresponds with the view here taken of the pre-existing fact. It grants or conveys powers only by instituting a general government to be the instrument of those powers.[1]

"This Constitution is not conventional, for it existed before the people met or could meet in convention. They have not, as an independent sovereign people, either established their union, or distributed themselves into distinct and mutually independent States. The Union and the distribution, the unity and the distinction, are both original in their constitution, and they were born United States. . . . The Union and the States were born together."

[1] In Article X. of the Amendments it is said: "The powers not delegated *to the United States* by the Constitution," &c. This statement of the *recipient* of the powers delegated is in discrepancy from the rest of the instru-

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This written constitution is a political fact, just as any statute law is a political fact so far as it may, *by being enforced*, prove that certain political powers are actually held and exercised by certain persons. The written constitution, so far as it is carried into effect according to its provisions, is a political fact, by becoming evidence that the use of some of those sovereign powers which belong to the States continuing in union is determined by their joint will and action, through the constituted government, and that the use of the residue of those powers which belong to the States continuing in union is determined by their several wills and action, through the State governments.

Among all the early opinions which supported, more or less distinctly, some theory of public law opposed to the doctrine of *State-Rights*, so called, none have been more triumphantly cited, by jurists of the class which used to be called *Federal*, than those of Chief Justice Jay and Judge Wilson sustaining the decision of the majority of the court in Chisholm *v.* Georgia. There are probably few among the readers of such citations in the pages of Story, or of others who have written on our public law since the war, who think of asking what is not usually told with these citations, that is, what benefit the plaintiff took by the judgment of the court in his favor against the State. Few who read these modern works will take the trouble to refer to the ill-printed and now dingy pages of 2 Dallas, on page 480 of which is the conclusion of the report of this case: —

"*Ordered*, that unless the said State shall either in due form appear, or shew cause to the contrary in this Court, by the first day of

ment, and should be construed to read in harmony; that is, as meaning, the powers not granted *by the United States* to the government, &c.

Those whose theory requires a United States, holding sovereignty, which is not identical with the States united, think the term delegated "unfortunate;" as does Dr. Woolsey, Pol. Science, ii. p. 251.

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next Term, judgment by default shall be entered against the said State."

The day after this decision was pronounced, a resolution was offered in the House of Representatives by Theodore Sedgwick of Massachusetts, "a very decided Federalist," for an amendment to the Constitution, protecting the States against suits by individuals.[1]

The State had never appeared in the case, and had not been represented by counsel on the argument. Nor did the State appear after this decree, or show cause to the contrary of any thing. On the page of 2 Dallas, above cited, in a note by the reporter, it is said: —

"In *February* Term, 1794, judgment was rendered for the Plaintiff, and a Writ of Enquiry awarded. The Writ, however, was not sued out and executed; so that this cause, and all the other suits against States, were swept at once from the Records of the Court, by the amendment to the Federal Constitution, agreeably to the unanimous determination of the Judges in Hollingsworth *et al.* *v.* Virginia, argued at February Term, 1798."

If the judgment of the Supreme Court in this case had been carried into execution, by the authority of the general government, against the will of the State, as against a party to a suit at law, the clause in the Constitution upon which the court asserted its jurisdiction would have been evidence of the political fact that the application of justice between "a State and citizens of another State" was among the powers which were to be exercised in the joint will and action of the States by the general government. The opinions of the several justices who had sustained that view might then have had value, as part of the evidence of that political fact. Though even in that case those judges could not have settled the political history of the formation of the Constitution.

[1] Hildreth's History of the United States, 2d Series, i. pp. 42, 408.

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Sovereignty distributed in Exercise.

But of what possible authority to determine the political duty of the citizen, in a crisis like that of 1861, are the opinions delivered in a case which, with all the other suits against the States then pending, was swept from the records of the court, by its own unanimous decision, almost a hundred years ago?

Sovereignty, being the attribute of an aggregate of political personalities, was, by the written constitution, *distributed in exercise;* but it was not *divided in possession.*[1] It was only as to this distribution that the provision as to amending by three fourths was declared.[2] The possession of that sovereignty by the States united was beyond any constitutional amendment, because it was, and has been above this or any written constitution; because it has been the primary political fact for which no rule, written or unwritten, could be stated.[3]

According to this view of the fact above the law, the fact on which the written constitution, *as law*, rested, even those powers which, in Article X. of the Amendments, are said to be "reserved to the States, or to the people," were not possessed by the States, or by the people

[1] It would seem that Mr. A. H. Stephens's idea was very nearly this. At least, he recognizes the *distribution* of sovereign powers as something distinct from the *possession* of sovereignty. Compare History of the War between the States, vol. ii. p. 28.

[2] Therefore this provision does not prove, as argued by Mr. Pomeroy, Const. Law, § 111, that the Constitution does not derive its authority, as law, from the States as the possessors of sovereign power.

[3] In the supposed case of an attempt of three fourths, by an amendment, to destroy the political existence of the other fourth of the States, or of a less number, — that could only be regarded as revolutionary change of the ultimate seat of power. The provision in Article V., "that no State without its consent shall be deprived of its equal suffrage in the Senate," might be considered as the acknowledgement of this. Though, what is there in the Constitution as law for the States, to prevent three fourths from doing away with the Senate altogether? or what is there to secure a State's representation in the House of Representatives? If all depends upon *words* in the Constitution, there is nothing to prevent the same provision from being amended out of existence.

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of the States, as severally sovereign, but as jointly sovereign only, that is, as they were *united* with the other States. They would not, as such, have held these reserved powers, unless they, at the same time, held the powers delegated to the general government. It was because they were *United* States, and only as they were such, that they held either class of powers.

Thus the States in Union held sovereignty as a unit.

Sovereignty in the American Republic was not *popular sovereignty;* the sovereignty of so many millions of human beings. The political people, organized as the people of the States, held it, and might be described as a *democratic oligarchy.*[1]

For this reason the name, the United States of America, accorded with the fact, and was the proper name.[2]

[1] Mr. John Austin, an English writer whose acuteness of thought and lucidity in statement have often been acknowledged in our own legal literature, speaking of "the supreme government of the United States of America," in his work, The Province of Jurisprudence Determined, vol. i. p. 222, has said: "I believe that the sovereignty of each of the states and also of the larger state arising from the Federal Union resides in the states' governments as forming one aggregate body, meaning by a state's government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which, the Union apart, is properly sovereign therein. If the several immediate chiefs of the several United States were respectively single individuals, or were respectively narrow oligarchies, the sovereignty of each of the states, and also of the larger state arising from the Federal Union would reside in those several individuals, or would reside in those several oligarchies, as forming a collective whole." Jameson, in Const. Convention, § 60, cites this view as erroneous, if understood as identical with that taken by Dr. Brownson and myself. Mr. Pomeroy also, in Const. Law, p. 29, rejects this, together with Austin's view of sovereignty in general, and considers it as involving the conclusion that there is no sovereign in the United States (ib. § 11, note), which result, as I understand the meaning of words, is a characteristic of the theory held by himself and Mr. Jameson, or by all who look for the sovereign of each country in the nation at large, or the inhabitants as a mass of individuals.

[2] "The sovereign people are not the people outside of State organization, nor the people of the States severally, but the distinct people of the several States united, and therefore most appropriately called the people of the United States." Brownson, Am. Rep. 227.

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Summary of the Historic Fact.

This then is history, — The inhabitants of the United States constituted a nation in which sovereignty was manifested by the organized political people of the several States, being united as States, and was exercised by a general government as the instrument of that organized political people of such States, being so united, and by State governments as the instruments of the political people of each several State, being united with the other States.

The political people of the several States in union instituted the general government, under the Constitution as law, to be the means for exercising their sovereignty over the people considered as a mass of inhabitants without reference to State boundaries.

And, negatively, — The people of the United States, considered as a mass of inhabitants without reference to State boundaries, did not institute the general government, under the Constitution as law, to be the means for exercising their sovereignty over the political people of the several States.[1]

Sovereign power cannot be held except by consent or will of the holder. No State, therefore, could be bound, as by law, to hold either the "delegated" or the "reserved" powers.

But, by the nature of the case, a State could not hold either one of these classes of powers unless, at the were time, it held the other also, by remaining united with power, other States. tion in hetical

[1] The proposition here denied is, however, precisely that which affirmed by Chief Justice Jay and Judge Wilson in Chisholm *v.* Georgia, see *ante*, p. 108, IX., and note; and which has reappeared in later cases in the Supreme Court, see *ante*, pp. 20, 31: and is now presented in a more systematic dress in the works of several recent writers on our political history and public law. See *ante*, pp. 114, 127.

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CHAPTER V.

THE EFFECT OF THE SECESSION ORDINANCES UNDER THE TRUE THEORY OF THE NATIONAL EXISTENCE. — THE POLITICAL ACTION OF THE GOVERNMENT IN ITS SEVERAL FUNCTIONS, PRESENTED AS IT MAY HAVE INDICATED A VIRTUAL RECOGNITION OF THAT EFFECT.

IN his first Message, July 4, 1861, President Lincoln said: —

"It might seem at first thought to be of little difference whether the present movement at the South be called 'secession' or 'rebellion.' The movers, however, well understand the difference. At the beginning, they knew that they could never raise their treason to any respectable magnitude by any name which implies *violation* of law. . . . They invented an ingenious sophism which, if conceded, was followed by perfectly logical steps, through all the incidents, to the complete destruction of the Union. The sophism itself is that any State may, *consistently* with the national Constitution, and therefore *lawfully* and *peacefully*, withdraw from the Union without the consent of the Union or of any other State. . . . This sophism derives much, perhaps the whole, of its currency from the assumption that there is some omnipotent and sacred supremacy pertaining to a *State*, — to each State of our Federal Union. Our State have neither more nor less power than that reserved to them in the Union, by the Constitution, — no one of them ever having a State *out* of the union; . . . having never been States, either in substance or in name, *outside* of the Union. . . . The States have their *status* IN the Union, and they have no other legal *status*. If they break from this, they can only do so against law and by revolution. The Union, and not themselves separately, procured their independence and their liberty. By conquest or purchase, the Union gave each of them whatever of independence and liberty it has. The Union is older than any of the States, and, in fact, it created them as States. Originally some dependent[1] colonies made the

[1] Von Holst, p. 6, note, has read the citation *independent*, and inserts after the word, in brackets: "[*i. e.*, independent of one another]."

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Union, and in turn the Union threw off their old dependence for them, and made them States such as they are. Not one of them ever had a State Constitution independent of the Union."[1]

It would be somewhat difficult, to say the least, to gather from Mr. Lincoln's various public utterances any consistent statement of the nature of the Union. His language is not here cited as having any *authority* whatever. These expressions, from the Message, are quoted only as they may indicate that Mr. Lincoln may perhaps have accepted, obscurely, indeed, and with many inconsistencies and much confusion of thought, that investiture of sovereignty which, in the last chapter, I have proposed as the only one consistent with the facts presented in history.

In his denial of the "assumption" upon which the "sophism" of a right of peaceable secession depended for its currency, Mr. Lincoln had before his mind the *fetish* idea of the Constitution, which is indicated by his saying that the States had only the reserved powers, — the powers reserved to them "by the Constitution," — and so denying that the States were the United States, and making the general government superior to the States in union.

His assertion, in this instance, of a Union — the United States, existing, in the order of time, before there were States to be united — and which, as a pre-existent power, gave them their existence is, so stated,[2] a contradiction in terms. It is only another presentation of the hypothetical *nation* or *people*, holding sovereignty by human nature, without any antecedents or any political organization,[3]

[1] Congressional Globe Reports, 1st Sess., 37th Congress, Appendix, p. 3; Macpherson's Political History of the Rebellion, p. 127. The italicizing, &c., above given is as in these reports.

[2] In his Inaugural, he had said: "The Union is much older than the *Constitution*." Macpherson's Pol. Hist. 106. This is a very different proposition, and is that which gives the key to the problem.

[3] Compare *ante*, p. 114. In this Message, Mr. Lincoln says of the Consti-

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which becomes more prominent in some of his later public utterances.

But still there is in these passages the recognition of the fundamental fact which is thus stated by Von Holst, vol. i., p. 6: "Each individual colony became a State only in so far as it belonged to the United States, and in so far as its population constituted a part of the people." And it is in support of this historical statement that Von Holst cites these words from Mr. Lincoln's Message.[1]

By continuing in union, the States hold sovereignty, and not otherwise; because they never held it otherwise, Constitution or no Constitution.

This possession of sovereignty as a unit *by the States in union*, and, as such, constituting a nation or a people which is known to exist politically only as there have been States in union, continued, as any possession of sov-

tution adopted for the Confederate States: "They omit 'we the people,' and substitute 'we the deputies of the sovereign and independent States.' Why? Why this deliberate pressing out of view of the rights of men and the authority of the people?" Macpherson Hist. p. 128. Mr. Lincoln probably referred to the "Constitution for the provisional government" (see A. H. Stephens's Hist. of the War, &c., ii. p. 714), which was superseded by that adopted March 11, 1861, ib. p. 722, and Appendix to Chase's Decisions, by B. T. Johnson, which reads: "We, the people of the Confederate States, each State acting in its sovereign and independent character."

[1] In this instance, Mr. Lincoln states a matter of historical fact without reference to the written Constitution as a law for the case. But in his Inaugural, March, 4, 1861, the leading idea before his mind seems to be that of the Constitution acting by its own vigor, the *fetish* idea. He says: "I hold that, in contemplation of universal law and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution, and the Union will endure for ever, it being impossible to destroy it, except by some action not provided for in the instrument itself." In this connection occurs a passage which has often been cited, judicially and otherwise: "It follows, from these views, that no State, upon its own mere motion, can lawfully get out of the Union; that *resolves* and *ordinances* to that effect are legally void."

See language very similar to this in Chase's opinion in Texas *v.* White, *ante*, pp. 11, 12.

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ereignty continues until it may be interrupted by conquest, or by revolution, or by abdication.

States cannot be obliged to hold sovereignty, either singly or in union with other States. Nobody can be *obliged* to hold *sovereignty*. *Obliged* to be *sovereign* is a contradiction in terms. Sovereignty, by its nature, cannot be held under law.

A State thus holding sovereignty in union with the other States may refuse to hold it *so*, in union.

Massachusetts, or Texas, or New York, or South Carolina, being in union with the other States, was one of an aggregate of personalities holding sovereignty as a unit. Each one, or any one of them, was free to refuse to hold it *so;* that is, in union. A State could not be obliged by any law to hold it *so*, that is, in union, any more than it could be obliged to hold it in any other manner whatever.

The eleven Southern States, that is, the severally organized political people of those States, had, in union with the other States, as an aggregate of corporate personalities, held sovereignty as a unit. They refused to hold it *so*, in union with the other States, and were free to refuse, because, by the nature of things, they were not obliged to hold it at all.

As such refusal, the ordinances of secession were not nullities. *Null* and *void* are terms applicable to transactions among persons holding powers *under law*. But the possession of sovereign power is not *under law*. These ordinances then were efficacious, in leaving sovereignty, an undiminished unit, exclusively in the States continuously holding it by the fact of their voluntarily continuing in union; the territory and population of the refusing States remaining under the same sovereignty as before, but thereupon vested only in the States continuing in the voluntarily existing union.[1]

[1] Brownson Am. Rep. 290. "The State, under the American system, as distinguished from Territory, is not in the domain and population fixed to it;

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Conditions of State-Lapse.

From the nature of the case, it being one where the subject-matter is above the domain of law, there will always be the practical question, which States are the existing States *in* union and which are those who ceased to exist by refusing to be of the Union. The solution of this may appear easier where there is on one side a large majority in number, correspondingly strong in population, territory, and other material elements of political power, and a minority on the other, correspondingly weak in these respects. But the case may be supposed that the States should be divided into two nearly equal portions, each claiming to be *the* United States. The possibility of such a crisis must be incidental to any investiture of sovereignty in a body of co-ordinate personalities, being essentially an oligarchy, and the solution could only depend on force. But the possible occurrence of such a crisis is not excluded by supposing a constitution resting on the will of the nation as a mass of individuals. For then it becomes merely a question of the numerical majority, and this would be decisive only as superior force of either party might appear to prove it the majority.

I have already cited Dr. Brownson's statement, *ante*, p. 133, note 1, that a similar result must have ensued even in the inceptive period of the Union, in 1781, had four of the States "stood out and refused" to ratify the Constitution.

nor yet in its exterior organization, but solely in the political powers, rights, and franchises which it holds from the United States, or as one of the United States. As these are rights, not obligations, the State may resign or abdicate them and cease to be a State, on the same principle that any man may abdicate or forego his rights. In doing so, the State breaks no oath of allegiance, fails to fulfil no obligation she contracted as a State. She simply foregoes her political rights and franchises. So far, then, secession is possible, feasible, and not unconstitutional or unlawful." The parallel here suggested conveys the erroneous idea that the States held sovereign powers, in union, under some law, as individual citizens hold rights and franchises. This is liable to mislead. The difference between abdication of sovereignty and the surrender of rights under law is in the fact that the political power abdicated immediately passes over to some one else.

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Von Holst, vol. i, p. 57, note, cites this from Brownson as "an interesting instance of the length to which American political doctrinarians of the period extending from the time of the Missouri Compromise to the outbreak of the civil war have gone." And his criticism is "The facts that the resolution of the convention made the Constitution binding only on those States that would ratify it, and that it never occurred to any one to look upon North Carolina and Rhode Island as territories until they should adopt the Constitution, are of no consequence to him. The proposition seems to him a logical conclusion of his general theory of the relation of the States to the Union, and that is sufficient for him." The German author is however entirely out of the way in supposing such "logical conclusion" to have been stated during the period he mentions. None could be required before an attempt to establish one or more States as severally sovereign should have forced *some* conclusion as it would have been forced at the close of the last century, if North Carolina or Rhode Island had set up independent alien sovereignty, or proposed to revert to the relation of colonies of Great Britain. Von Holst's own statement, as already cited in this chapter, should have enabled him to understand that, if it never occurred to any one at that time to treat those States as territories, neither at that time did anybody regard them as foreign countries, nor did, at that time, the laws of alienage apply as between their citizens and those of the other States; that is, in the interval between the action of the convention and the adoption by those States of the proposed constitution of government.[1]

At the outbreak of the movement, there was, of necessity, a doubt how far the act of the State conventions and officials of the existing State governments should be ac-

[1] Not even in Tucker's argument in App., note B, § 13, of his Blackstone, Vol. i. As to Judge Cooley's discovery, see *ante*, p. 132, note 2.

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cepted as the act of the political people, in each of the eleven States.[1] This doubt was expressed by Mr. Lincoln in his first Message. But under the aspect which the rebellion assumed as it progressed, compelling, by its sheer magnitude, recognition as a territorial war even from the government as to which the persons engaged were deemed rebels, there could be no question but that all, without reference to majority or minority, were involved in any consequences which might affect the State as a political personality. This conclusion is based upon a principle which I assume, as a principle or as a fact, that political power can only belong to the political people of the State, as an integer.[2] The idea that the political franchises of the individual citizen are an inherent personal right is a fragment of the rubbish of the social-compact origin of government. The theory of a State — a loyal or well-disposed State of the Union — existing all the time of the civil war, because the written Constitution requires or presupposes the existence of such States, somewhere, in some supposed human beings, supposed to wish to be citizens of

[1] See Brownson's Quarterly Rev. (1864) pp. 39, 40; Am. Rep. 312. Foreign nations, it will be remembered, took a position on the question of belligerency which excluded any distinction between the State, as a political person, and the inhabitants, as citizens of the United States; because they recognized the State governments as having capacity to wage war. *Ante*, p. 56.

[2] In State of Georgia *v.* Stanton, 6 Wall. 65, it was said in the argument of the counsel for the State, — "A republican State, in every political, legal, constitutional, and juridical sense, as well under the law of nations as the laws and usages of the mother country [compare the historical statement, *ante*, pp. 123–125], is composed of those persons who, according to its existing constitution and fundamental law, are the constituent body. All other persons within its territory or severally belonging to its people, as a human society, are subject to its laws and may justly claim its protection. But they are not, in contemplation of law, any portion of the body-politic known and recognized as the State. On principle, it must be quite clear that the body-politic is composed of those who by the fundamental law are the source of all political power or official or governmental authority." Citing Luther *v.* Borden as illustrating this.

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a State of the United States, and to be *loyal* towards the government of the United States, in feeling, action being impossible, would seem too absurd for sober statement, if it had not actually been presented in various shapes in political declarations and forensic discussion.[1]

The reconstruction policy of Congress was, by some, supported on the idea of finding the proper subject for receiving the benefit of the constitutional guarantee *to a State* of a republican government in such citizens or single citizen as might be supposed not to have *forfeited* his personal *sovereign* rights by rebellion.[2]

A doubt as to the position actually taken by the political people of the State, as an integer, was most apparent in the case of Tennessee; where the eastern portion was mainly occupied by those who were opposed to the attempted secession. But, in Keith *v.* Clark, this is not

[1] Brownson Am. Rep. 341. "The theory on which the government attempted to reorganize the disorganized States rested on two false assumptions: first, that the people are personally sovereign; and second, that all the power of the Union vests in the general government. The first, as we have seen, is the principle of so-called 'squatter sovereignty' embodied in the famous Kansas-Nebraska Bill, which gave birth, in opposition, to the Republican party of 1856. The people are sovereign only as the State, and the State is inseparable from the domain. The Unionists without the State government, without any State organization, could not hold the domain, which, when the State organization is gone, escheats to the United States, that is to say, ceases to exist. The American democracy is territorial, not personal."

[2] Whatever may have been Mr. Lincoln's plan for restoring "the States in rebellion to their proper practical relations to the Union" (*ante*, p. 87), he also supposed the existence of an "element" in those States loyal enough to accept the guarantee. See Message of Dec. 8, 1863, *ante*, p. 86.

Mr. Justice Harlan, in Keith *v.* Clark, 7 Otto, 481, says of "the usurping State government," — "which government, at that time, was regarded by the mass of the people of Tennessee as established upon a firm and enduring foundation." Yet on the next page of the report he says, — "When therefore the people of Tennessee who recognized the authority of the United States assembled by their delegates in Convention in January, 1865." It may then be inferred that this latter "people of Tennessee who," &c., were not "the mass of the people of Tennessee," &c. See also extracts from the same opinion, *ante*, pp. 28, 29.

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mentioned at all, in any opinion, as an exceptional element in the case, and the general intention of each Justice seems to be to present an argument equally applicable to any other of the eleven States.

In the first and second chapters of this essay, I have marshalled the leading statements made, as to the status of the eleven States, by those who have had the best right to speak in the name of the sovereign, whoever that sovereign may have been, who prevailed in the civil war as against a rebellion.

But, as may appear from the conclusion of the second chapter, I despair of framing on those statements a consistent political theory, correspondent to the facts as a law is correspondent to legal rights and obligations.

Yet as the question relates to *matter of political fact* and not to *matter of law*, the *action* of which those statements are the record may indicate some theory, beyond the domain of law, adequate to the support of such political action, which will or must be now accepted *as fact*, whatever may have been the language used.

The political effect here attributed to the transaction expressed by the State ordinances of secession, accompanied by resistance to the authority of the general government, follows logically from that actual possession of sovereign power under which the written Constitution became public law. But I do not here speak of something to be accepted, as the solution of the political and legal problems which have arisen from that transaction, merely because it is such a logical conclusion. I speak of something which, *having taken place*, has, in reality and in spite of disguises, been accepted *as a political fact* by the government and people of the United States; and I say that, from this stand-point, the action of the government in suppressing the rebellion and in the reconstruction methods can be justified as constitutional, that is, as correspondent to pre-existing political

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conditions; while, from any other, it is justifiable only as successful usurpation is justified by success. To demonstrate this according to the conditions under which the political question is now presented,[1] I propose to show how cases at law, as they have actually been decided, like those cited in Chapters I. and II., can be reconciled with this doctrine; and how the same doctrine may justify, more intelligibly and consistently than can be done on any other basis, the action of the government in reference to belligerency and treason; and, finally, how it may appear to have been applied, substantially, in the political action of the government, by its several departments, in reference to reconstruction.

At the moment of the change of persons holding the sovereignty over such territory and population which, according to this view, had occurred, the local institutions and established organs of government continued, as legal institutions, by the general principle of the continuation of laws, but then and thereafter derived their validity from a different political authority, that is, from the sovereignty then vested exclusively in the *United* States, that is, the *other* States continuing voluntarily in Union; a political authority sustaining and producing legal relations, rights, and duties, so far as they might be relations, rights, and duties not antagonistic to that sovereign right.[2]

[1] Brownson, Am. Rep. 310. "It is in some measure characteristic of the American government to understand how things ought to be done only when they are done and it is too late to do them in the right way. Its wisdom comes after action, as if engaged in a series of experiments."

[2] Brownson, Am. Rep. 306. "Another reason why the doctrine that State secession is State suicide has appeared so offensive to many is the supposition entertained at one time by some of its friends, that the dissolution of the State vacates all rights and franchises held under it. But this is a mistake. The principle is well known, and recognized by the jurisprudence of all civilized nations, that in the transfer of a territory from one territorial sovereign to another, the laws in force under the old sovereign remain in force after the change till abrogated or others are enacted in their place by the new sovereign, except such as are necessarily abrogated by the change

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Continuation of Sovereignty in the United States.

The legal effect which took place in this instance was such as occurs whenever territory and population pass from one sovereign to another, as either by conquest or cession under treaty arrangements made between nations without reference to the choice of the inhabitants of such territories. The laws, that is the municipal law, distinguished either as public or private, of the ceded or conquered territory remain in force, though they derive their actual authority from a different political personality. In the instance of these States, the local government was still, as to its formal organization, like that of any one of the United States, but, in its essential legitimacy, it was the government of an organized Territory of the United States.

The consequence here ascribed to the action of the political people of a State in this rebellion may be conceived of as possibly occurring without any accompanying acts of resistance to the government of the United States, as organized at the time. The case might be supposed, that the political people of a State should, merely by their *non*-action in political relations, cease to participate as a State in the general or national exercise of power.

In the present instance, however, while the political people of each of these States ceased to share sovereignty as one of the United States, the individual persons who had constituted that people, supported by the rest of the local community, controlled all local organization by revolutionary force, and, through their acting officials, made it their instrument for separating the territory and population from the actual sovereign, that is, from the other States which then, *exclusively*, constituted the United States.

itself of the sovereign, not, indeed, because the old sovereign retains any authority, but because such is presumed by the courts to be the will of the new sovereign. The principle applies in the case of the death of a State in the Union. The laws of the State are territorial till abrogated by competent authority, remain the *lex loci*, and are in full force. All that would be vacated would be the public rights of the State, and in no case the private rights of citizens, corporations, or laws affecting them."

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The individual persons who did this, that is, the officials and all who, as electors, supported them as a government, therefore usurped government, and, in so doing, committed treason, or what would be treason in any other country in the world; independently of bringing themselves within the constitutional definition of treason, by "levying war" against the United States, "adhering to their enemies, giving them aid and comfort."

But the terms "usurping governments," "illegal governments," are misleading terms as used in this connection.[1] If the term *government* is used to designate the persons who, as State officials, administered the government of these States, they, as usurpers of political power, constituted a "usurping government." As they individually and personally may have been sworn to support the Constitution of the United States, they committed perjury, and, whether so sworn or not, treason also, within the Constitutional definition. But the *State government*, in the concrete, is not under any law but that which emanates from the political people of the State whose instrument it is. If they sustain it with their votes, it is absurd to say that *their* government has been usurped. It is this political people who are the party taking the consequences of their own political choice. *Government*, as *act*, cannot be usurping or illegal. It is neither legal nor illegal. *Illegal government* is contradiction. So far as it is government it is not illegal action, and so far as it is illegal action it is not government.

The usurpation which actually occurred was therefore not of the *government of a State* of the United States, nor usurpation as against a loyal *people of a State*. It was the usurpation of that government, as over the Territories of the United States, which is vested in Congress. The legitimate authority of Congress, as representing the United

[1] Compare the citations from opinions in Keith *v.* Clark, *ante*, pp. 28–33.

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(other) States, over such territory and its population was, for the time, obstructed by domestic insurrection, rebellion, and civil war, as might be that of any sovereign, under any form of government.[1]

The relations of ordinary civil or social life continued, and new rights and obligations continued to arise;[2] as would have been the case under whatsoever persons might there actually exercise power; who would either be sustained as a new sovereign (by successful revolution; in which case there would have been an end of our questions), or be regarded as *locum tenens* for the actual possessor of sovereignty, that is, the people of the (other) States united. All would have been valid that could have been valid, had the rebellion occurred in an organized territory never having been received as a State.

The question of legal rights and obligations, in transactions occurring under the continuance of this usurpation, would thereafter arise for judicial determination, after the re-establishment of the national authority; as in the case Keith *v.* Clark, and other cases cited in the first chapter.

Admitting the propriety of speaking of the State governments as *usurping governments*, whether according to the view stated in the dissenting opinions in Keith *v.*

[1] Brownson, Am. Rep. 307 (immediately following the passage last cited). "But the same conclusion is reached in another way. In the lapse of a State, or its return to the condition of a Territory, there is really no change of sovereignty. The sovereignty, both before and after, is in the United States. The sovereign authority that governs in the State government, though independent of the general government, is the United States. The United States govern certain matters through a general government, and others through particular State governments. The private rights and interests created, regulated, or protected by the particular State are created, regulated, or protected by the United States, as much and as plenarily as if done by the General Government, and the State laws creating, regulating, or protecting them can be abrogated by no power known to the Constitution, but either the State itself or the United States in convention legally assembled."

[2] Williams *v.* Bruffy, 6 Otto, 192. Horn *v.* Lockhart, 17 Wall. 570. As to continuation of the State laws in Georgia, after appointment of a military governor, see Ketchum *v.* Buckly, 9 Otto, 188.

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Clark, or that which has been presented in this chapter, still it seems that a general presumption in favor of the validity of all acts of any *de facto* government should apply, so far as to throw on the party denying the claim the obligation of alleging and offering some *prima facie* evidence that the transaction whose validity was contested had been in aid of the rebellion. So that the view taken in the opinion of the court on this point[1] may be sustained, independently of its political doctrine as to the nature of the Union, or even accepting any which may have been preferred by any of the dissenting members.

In the opinion delivered by Mr. Justice Miller, for the court, in Keith *v.* Clark, the State of Tennessee is placed on the same plane with nations in general, such as Vattel, Wheaton, and others regard as subjects of rights and duties under international law.[2] It may appear from other testimony adduced in the first and second chapters, that, so far as the use of words and phrases indicates the nature of the acts which they accompany or which they are intended to describe, a similar belief in the position of the States of the confederacy had been more or less clearly accepted by all branches of the government, and probably also by a vast majority of its supporters.

But however iniquitous, on the part of either belligerent, an international war may be by reason of the political intentions of such belligerent, there can be no resulting alteration in the validity of relations existing between the private citizens who owe political allegiance to such belligerent. There can be no original illegality, from the nature of the consideration, in contracts made by the government of such belligerent with its own citizens in supporting its cause against the other belligerent party. Nor can defeat have the effect of making such contracts illegal. We

[1] 7 Otto, 466, *ante*, p. 27.
[2] *Ante*, p. 24; 7 Otto, 459, 460.

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might, indeed, conceive of a treaty stipulation to which the victor, at the end of a war, had compelled the defeated nation to agree, binding the latter to repudiate all obligations to its own citizens incurred under such a contract, or to annul all contracts between its citizens made with the view of resisting the victor as a public enemy, while the war was still pending. But it would certainly be for the party relying, in a suit at law, on the effect of this arrangement, to plead it and to adduce proof to bring within its terms any contract which might be the subject of such suit. In other words, the presumption would be in favor of the legality of any relation admitted to have had sanction in the authority of the defeated nation.

If then the eleven States are regarded as conquered nations, it would seem that no court of law can admit a presumption against the validity of any relation, as legal, which may be attributed to the authority of one of the compromised States; or that, in other words, the presumption must be taken to be in favor of its validity; as was affirmed by the majority in Keith *v.* Clark, and had been by the court generally, in earlier cases.[1]

More clearly this would be the case if the legal relation in question arose from the exercise of one of the "reserved powers," such as the power to establish a bank, and not from a power not exercised by the States severally, but by the general government, and *usurped* during the rebellion, according to Mr. Justice Bradley's view. *Ante*, p. 31.

But these arguments, which agree in sustaining rights and obligations derived from the local authority of any one of the eleven States, would not accord also in their application to such as could only be attributed to the legislative action of the Confederate government. According to the view here taken of the effect of the secession ordinances, this so-called government, which professed to exist only as

[1] *Ante*, p. 7.

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the eleven States might be in existence, came into being only after these States had lapsed into the Territorial condition in relation to the government of the United States. It was therefore, under any aspect, legal or political, an insurrectionary government and *de facto* belligerent, and should have been accepted as such by all the world, and as having no claim to *political* recognition except such as might be derived from a subsequent revolutionary success. Many acts done under its actual force must now be accepted as beyond the pale of legal remedy, having been settled by the *vis major*, independently of the legal consequences to parties never within its temporary jurisdiction, arising from its temporary belligerency.[1] So that this view would be in harmony with the decisions of the Supreme Court on this point; whether those decisions deny any possible validity to claims founded on such authority, or are merely to the effect that any claim founded on its legislative action must be pleaded under a presumption against its legal validity.[2]

But this limitation can be logically sustained only on the idea of State-lapse or State-suicide.

For if the view taken in the opinion of the court by Mr. Justice Miller, in Keith *v.* Clark, which recognizes the States of the Confederacy as so many nations in alliance, is to be accepted, the Confederate government could only be regarded as their agent, asserting power and claiming obedience as the representative of each of such States.

The provision in the Constitution forbidding "any State

[1] As in cases of insurance of vessels destroyed by confederate cruisers. See Mauran *v.* Ins. Co., 6 Wall. 1; Opinion of the majority of the Court delivered by Nelson, J.: Chase, Ch. J., and Swayne, J., dissenting. It may be surmised that a difference of view as to the nature of a State of the Union was at the root of the want of agreement in these cases, as in many others before the Supreme Court.

[2] Compare *ante*, p. 7, and notes; and the opinions in Ford *v.* Surget, 7 Otto, 594, noticed *ante*, p. 61, n. 2.

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from entering into any agreement or compact with another State" must indeed be taken to have imposed an obligation upon these States as political persons, if they continued to exist as such. But here the question is of political capacity, not of legal right. The provision itself is a recognition of the capacity. If the case is to be regarded as analogous to the breach of a treaty agreement between independent nations, it is difficult to see how private individuals, whose rights of person or of property may have been affected by a State's violation of this obligation, should be held responsible.

It might be suggested that in refusing to recognize claims founded on the legislative authority of such "rebel governments," or "unlawful governments," or "usurping governments," the judiciary may possibly be benefiting one rebel at the expense of another. It is probably argued that this judicial refusal to recognize the validity of the contract is founded on motives of public policy,[1] to serve as a warning for the future against rebellion, as contracts on an immoral consideration are held void, where each party has been *in pari delicto*. The analogy, however, is not complete. In the case of suit for articles of merchandise used in aid of the rebellion,[2] a refusal to enforce the contract might benefit a traitor at the expense of an innocent party. If the individuals who respectively made the population of the States of Texas and Tennessee at the dates of the reconstruction of those States, were, in each case, as a mass of persons, the same as those who supported the rebellion, then the recovery on the bonds sold for the State of Texas inured, as the repudiation of the notes of the Bank of Tennessee would have inured, to the benefit

[1] See opinion of the court by Miller, J., and separate opinions by Clifford and Davis, JJ., in Sprott *v.* United States, 20 Wall. 461.

[2] See cases like Hanauer *v.* Doane, 12 Wall. 345; Hanauer *v.* Woodruff, 15 Wall. 439.

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of so many rebels or traitors, though the bonds in one case and the notes in the other might have passed into the hands of parties always loyal in feeling to the United States. The reasoning which distinguishes two different moral beings, in the single political personality whose rights and obligations are in question, savors of the subtleties of the schoolmen of the middle ages.[1]

As the legal rights and obligations of private persons would not cease to subsist, when this change of sovereignty by State-lapse or State-suicide occurred, so rights and obligations would also continue in relations to which the State itself had been a party. The political person who took the place of the State and who, in that case, would have been the United States represented by the general government, would have succeeded to any rights and obligations which such State could have claimed or owed. The difference would be in the *forum* in which such rights and obligations should be maintained or enforced. Thus, under the circumstances on which the case of Texas *v.* White was founded, the United States should have taken the plaintiff's place. There would have been no *State* of Texas to appear by original bill, but the United States could have proceeded in the subordinate courts, subject to the appellate jurisdiction of the Supreme Court.[2]

A decision on the merits in a case of this sort would seem to turn on the inquiry whether the transfer of property really belonging, at the time, to the United States as successor to the lapsed State, could convey a valid title; and this would appear to depend, not simply upon the question whether this usurping government of a *Territory*, which it would be, could sell such property; nor yet upon

[1] See Mr. Justice Grier on the plea of "insanity," *ante*, p. 17; and Mr. Justice Miller on "logical legerdemain," p. 24. The argument for denying the moral identity of the communities whose rights and obligations were in question might be called the *converted-sinner* argument.

[2] Const. Art. iii., sec. 2.

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the application of the proceeds; but, whether the purchaser took the property, not in the ordinary course of trade in such securities, but with the intention to defraud the real owner, the United States.[1]

The question which was presented in White *v.* Hart, *ante*, p. 19, had, on the merits, no necessary connection with the rebellion. It might have arisen by the introduction of a clause, such as that on which the case depended, into the constitution of any State in which slavery had just ceased to exist. Or the same question might equally have arisen in the case of a Territory in which slavery had existed until admitted as a State under a constitution containing a similar clause. The question then would have been the same under the theory here presented; which supposes Georgia, before readmission under the Constitution of 1868, to have been, in reality, only a Territory of the United States. The decision actually arrived at by the majority of the court might have been the same under this view.

Strictly speaking, therefore, there was no need to discuss the question presented by the allegations in the pleas which related to the political validity of those transactions which had led to the adoption of the clause in the State Constitution, and which are known as Reconstruction, and which the court accepted, either for law or fact, on the authority of the "political department."

The questions which are here considered as they might have presented themselves under that doctrine of State-lapse or State-suicide which is here propounded, arose in those cases before the Supreme Court which were cited together in the first chapter as bearing *directly* on the question of the continuance or non-continuance of political existence in the case of the eleven States compromised by

[1] The result of this view would seem to agree with the actual judgment in Texas *v.* White, *ante* p. 15, and with the language of Waite, Ch. J., in Huntington *v.* Texas, 16 Wall. 413.

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the rebellion. Other cases, before the same court, involving questions on belligerency and treason were cited in the second chapter, as also necessarily considered in reviewing judicial opinion on the same question of the status of those States.

It is then proper to consider here how questions of these two classes would present themselves under this doctrine of State-lapse or State-suicide, as here advanced.

As, according to the view here taken of the political effect of secession ordinances followed by war, there was no longer any possession of sovereignty by the political people of these eleven States, there were none who, in these actual Territories, could be recognized as belligerent in virtue of political capacity to engage in war.[1]

Any recognition of those *States* as the belligerent party involves the attribution of sovereignty to each of those States severally.[2] Those therefore who, at that time, administered the executive, legislative, or judicial functions of the government of the United States could not, consistently with the attitude of that government towards the rebellion, make such a recognition; nor could they by any such recognition as they may have made during the war, bind the United States, that is, the other States in union — the actual sovereign; though, in the case that the Confederacy had been successful in establishing the separate

[1] If it be conceded that the eleven States continued to exist as States, political personalities, an argument for recognizing their belligerent capacity might be drawn from the very clause in the Constitution which declares that: "No State shall, without the consent of Congress, . . . keep troops or ships of war in time of peace, . . . or engage in war, unless actually invaded or in such imminent danger as will not admit of delay." Art. i., sec. 10, 2. The capacity of each State to appear before the world as a belligerent power is here indicated by the prohibition against its use in certain cases. Compare the comment on this clause in Von Holst, i. 259, 260, in connection with the action of Massachusetts in 1814.

[2] Mr. B. T. Johnson, in his preface to Chase's Decisions, argues for this as the consequence of the actual recognition of a state of belligerency. See *ante*, p. 52.

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existence of its members, that fact could have been accepted by the government of the United States, as any political fact is accepted by all the world.

But belligerency can be recognized in an actually existing military force, independently of recognition of any political personality as one whose right of dominion involves capacity to send its subjects or citizens into the field, with the rights and duties defined by international usage. Belligerency has been repeatedly recognized in civil wars, among all civilized nations. A certain amount of power to maintain the field, as against a government already existing, requires recognition as a belligerent force. This is a recognized principle of the modern *jus gentium* and *jus inter gentes*.[1]

The recognition of belligerency in the southern military forces under the command of General Lee or of General Jefferson Davis, as actual commander-in-chief, whether made by the President of the United States, as commander-in-chief on the part of the government, or by the generals in the field, or by Congress, did not involve recognition of the eleven States as still holders of sovereignty, under any theory, either as in severalty or in union, as States of the United States.[2]

[1] Phillimore, Int. Law, ii. p. 143. Compare Wheaton, Int. Law, Dana's ed. p. 84; Lawrence's ed. p. 39, and the notes of the American editors.

It is said, in the opinion for the court by Mr. Justice Field in Williams *v.* Bruffy, 6 Otto, 176, 186, 187: "When a rebellion becomes organized and attains such proportions as to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights, . . . but . . . to what extent they shall be accorded to insurgents depends upon the considerations of justice, humanity, and policy controlling the government." The idea conveyed by the last clause may be questionable. It does not appear how *belligerency*, or the sum of the powers which distinguish a belligerent power, can be described as more or less; and in case of civil war it is extorted from the party claiming political supremacy by the power which the other party has to retaliate. The distinction which should have been judicially made was in respect to the personality recognized, whether States belligerent *de jure*, or a body of insurgents belligerent *de facto*.

[2] Compare the full discussion of two views on this point in the opinions

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The distinction here presented may seem, at first sight, an unpractical refinement, — a distinction without a difference.[1] It was undeniable that the persons who, in their official capacity, constituted the local governments, whether usurped or not,[2] were those who, through the confederacy, carried on the war. The war was carried on, on the part of the population in rebellion, by means of the pre-existing State organizations.[3]

Or it may now be more correct to say that such did, *at the time*, appear to be an unpractical refinement, and that, afterwards, some who had apparently so considered it may have inclined to recognize the importance of having neglected to observe this distinction.

Several passages from the opinions delivered in the Supreme Court in the Prize Cases, 2 Black, 660, have already been cited, *ante*, pp. 49, 50, as indicating a recognition, by the court, of the eleven States as the belligerent party.

In Williams *v.* Bruffy, 6 Otto, 187 (October, 1877),

of Justices Harlan and Clifford, agreeing on the same decision of the case before the court, in Ford *v.* Surget, 7 Otto, 594.

How different the color which may be given by slight differences of speech, even by persons maintaining similar conclusions, may appear by a comparison of Mr. O'Conor's argument, in the case of Mr. Davis, with that of Mr. W. Green, in Keppel's Admr. *v.* The R. R., both fully given in Mr. B. T. Johnson's Chase's Decisions. Mr. O'Conor's argument (pp. 115, 116) appears to be limited to a recognition of belligerency only to the extent it might be made in case of revolutionary war in a country under an integral, undistributed, or consolidated government, without any State organizations like our own; while in that of Mr. Green (pp. 175, 183), the intention to present *the States* as the personality recognized is obvious.

[1] Or what some would call a "profitless abstraction" or a "pernicious abstraction." Compare *ante*, p. 48 [*d*], and *post*, the beginning of Chapter VII.

[2] See *ante*, p. 158.

[3] It was this existing political machinery which caused the war to have, *ab initio*, its territorial character, independently of the question of the political existence of the States. But that this territorial character did not depend upon the political existence of the States was shown by the instances of Western Virginia and Eastern Tennessee.

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it was said by Mr. Justice Field, in reference to those cases: —

"It was there simply held that when parties in rebellion had occupied and held in a hostile manner a portion of the territory of a country, declared their independence, cast off their allegiance, organized armies, and commenced hostilities against the government of the United States, war existed; that the President was bound to recognize the fact and meet it, without waiting for the action of Congress; that it was for him to determine what degree of force the crisis demanded, and whether the hostile forces were of such a character as to require him to accord to them the character of belligerents, and that he had a right to institute a blockade of ports in their possession which neutrals were bound to recognize."

The term "parties in rebellion" is not one of very precise meaning in such a connection. It may be questioned whether it is any better suited to the case of natural persons in rebellion than to that of political personalities in rebellion. But the doubt, here, is whether it is not rather too vague a term to be adequate to describe the bearing of the decision of the court in the Prize Cases.

That decision was also referred to in Ford *v.* Surget, 6 Otto, 176, in the opinion of the court delivered by Chief Justice Waite, in which it is said: —

"Without attempting to state all the reasons assigned in the adjudged cases for the conclusions herein announced, we assume that the following propositions are settled by or plainly to be deduced from our former decisions.

"1. The district of country declared by the constituted authorities, during the late civil war, to be in insurrection against the government of the United States was enemy territory, and all people residing in such district were, according to public law and for the purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war, and while they remained within the lines of the insurrection, as enemies, without reference to their personal sentiments."

Whether these two statements of the position previously

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taken by the court are or are not sufficiently definite in terms, it may perhaps be said with truth that they are clear enough to indicate all that the court was competent to recognize, in the circumstances, and therefore all that it ought to have recognized. But whether this is an accurate description of the view of the facts taken by the court, during the war, is a matter on which there may always be some difference of opinion.[1]

The cases which, together, were reported as the Prize Cases, were of four vessels seized at different times and places. These were the Amy Warwick, the Crenshaw, the Hiawatha, and the Brillante.

The Hiawatha and the Brillante were vessels owned abroad, and in their cases, the question was as to the rights of blockade, as against all the world, and not merely as against citizens of the eleven States. But the belligerency

[1] Compare the separate opinion delivered by Mr. Justice Clifford in Ford *v.* Surget.

In connection with these opinions on the question of belligerency may properly be cited note 32 of Mr. Dana's edition of Wheaton's Int. Law, part i., § 56, entitled *The United States a Supreme Government*, which comprehends a clear statement on several very important points relating to the civil war. In the course of this, p. 83, it is said: "The States in rebellion organized a central government," &c. In the sequel, the action of the Confederate government in the war is alone spoken of. It is further said: "The United States did not, of course, declare war; for there was no body-politic against which to declare it, the very existence of the Confederate Government being treason; and the separate States could not be regarded as capable of performing any function in hostility to the United States. The state of things was treated as a rebellion of individuals, risen to the dimensions of a war. It was met by the exercise of the powers of war on the part of the United States, practically, and for the purpose of suppressing the insurrection. The government did, in practice, treat the rebels as belligerents while the war lasted, holding them as prisoners of war, making use of exchanges and other practices of war. This was from necessity, to prevent retaliation, and from humanity. No general *status* of belligerency was conceded to them by law, but the legal *status* of each person engaged in the rebellion was that of a criminal under the municipal law."

This statement appears to me to be, like these in the two cases last cited, — wisdom after the fact. But wisdom after the fact, though it may be the most reliable wisdom, is not always history.

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necessary to the assertion of the rights of blockade, and maritime search for and capture of contraband of war, had nothing to do with the question of the political relation between the government of the United States and the populations of those eleven States. The case would have been the same had the rebellion occurred under a consolidated or unitary form of government, without any appearance of a federative constitution, and, in relation to these rights of our government, the case, as to the rest of the world, was the same whether the antagonist belligerent was a political State or nation, belligerent *de jure*, or only an insurrectionary force, belligerent *de facto*. The political question of the status of the States could remain in abeyance during the recognition of such belligerency.[1]

The Amy Warwick was a vessel owned by citizens and permanent residents of Richmond, Virginia, with a cargo of coffee, belonging in part to such citizens, which had been captured Aug. 10, 1861, on a return voyage from Rio Janeiro, on the high seas by a vessel of war of the United States. The vessel and cargo had been libelled as prize of war by the captors in the District Court of the United States for the District of Massachusetts, before Judge Sprague, and a decree of condemnation, as prize, entered.

In the opinions delivered by Judge Sprague on this case, this decision is placed on precisely the same principles as those applying to captures in war between independent nations; and, as I understand his expressions, the judge was careful to recognize the State of Virginia as the belligerent, in stating the foundation of his argument.[2]

[1] It is only to the case of such belligerency that the authorities apply which were cited by the court, 2 Sprague, 133, and by counsel for the libellants, 2 Sprague, 125, 2 Black, 654, to sustain the proposition that "in internal wars it is competent for the sovereign to exercise belligerent powers generally." Compare Nelson's opinion, ib. 696.

[2] In a note relating to this case, in Mr. Lawrence's Wheaton's Int. Law, p. 586, the editor says: "The distinction was made between citizens of a loyal

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Judge Sprague's Recognition of the Belligerent.

On page 136 of 2 Sprague's Decisions, Judge Sprague said, —

"In cases which may come within the definition of civil war, there may be only an assemblage of individuals in military array, without political organization or territorial limit; or armed bands may make hostile incursions into a loyal State, or hold divided, contested, or precarious possession of portions of it, as now in Missouri and Kentucky. In such cases, local residence may not create any presumption of hostility. Far otherwise is it in Virginia."

After reciting the action of the State Convention, in adopting the ordinance of secession and forming a confederacy with other Southern States, Judge Sprague said further, —

"All this was, indeed, subject to be disaffirmed by a vote of the whole people of the State, to be taken on the twenty-third day of May: but no part of it has been disaffirmed; on the contrary, the popular vote on that day, apparently by a large majority, ratified

State like Kentucky or Missouri, where armed bands may make hostile incursions and hold divided, contested, or precarious possession of portions of it, in which case local residence may not create any presumption of hostility, and such a State as Virginia, which, by the act of the established government, approved by a majority of its citizens, has placed itself in war with the Federal government. The State sovereignty was our enemy, and every thing that could afford aid and comfort to the enemy was contraband of war, whatever the private opinions of its owner. The claimant was identified with the State of Virginia as a subject of that State, living in its jurisdiction, and for various reasons his claim to the property in question was inadmissible and the said property must therefore be condemned."

In Mr. Dana's Wheaton's Int. Law, p. 375, note 158, *Belligerent Powers exercised in Civil War*, in an analysis of this "elaborate and thoroughly reasoned opinion" a different view, as I understand his words, is given by the editor of the bearing of the decision on this point: as, in stating the points decided, he says: "(3) That in case of civil war, among the belligerent powers to be exercised, may be that of condemnation as 'enemy's property,' in the technical sense of the prize law. (4) That one of the proofs of 'enemy's property' is, that it belongs to persons who are at the time permanent residents in a place or region which is under the actual control of the enemy, and of which he has firm possession. (5) In the present case, Richmond, Va., was unquestionably within the lines of the enemy and under his actual control and *de facto* jurisdiction, civil and military."

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the proceedings of the convention, the alliance, and the war. The western counties of the State nobly vindicated their honor and their fidelity by refusing submission to rebel mandates, and adhering to the Union. They did not, indeed, change their domicile, but they removed the power of rebel Virginia from the place of their domicile. The Virginia rebellion was not the act of individuals asserting that moral right of revolution which belongs to all subjects, but it was the assertion of a pretended State right. It was founded solely on the deadly doctrine of secession, which claims that the State, as an organized political body, may sever itself from the Union. In attempting this, and carrying on the war, it acted by majorities claiming implicit obedience from the minority. The exterior boundaries of the State and its internal division by counties have been clearly defined; and the city of Richmond, where these claimants reside, is within the territory over which, by known limits, this political body has, for nine months past, held absolute dominion."[1]

On the argument in the Supreme Court in the case of the Amy Warwick, it was said by Mr. Dana for the libellants: This case "presents a single question which may be stated thus; at the time of the capture, was it competent for the President to treat as prize of war property found on the high seas, for the sole reason that it belonged to persons residing and doing business in Richmond, Virginia?" 2 Black, 650.

In the opinion of the Supreme Court, delivered by Mr. Justice Grier, it is briefly said with reference to the Amy Warwick: "All the claimants, at the time of the capture and before, were residents of Richmond, Va., and were engaged in business there. Consequently, their property was justly condemned as 'enemies' property.'" And throughout this opinion the judgments of the court sustaining all these several captures are placed on the ground

[1] The cases cited by Judge Sprague, 2 Sprague's Dec. 137, — The Gerasimo, 11 Moore, P. C. 101, and ib. 140, the Venus, 8 Cranch, 253, — are in point for his argument, only on the assumption that the belligerent recognized is a political person; known by its precedent capacity to engage in war.

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that the belligerency known to the court was the same as in the case of war between two distinct nations.[1]

The dissenting opinion by Mr. Justice Nelson, in which Taney, Ch. J., and Catron and Clifford, JJ., concurred, relates mainly to the case of the Hiawatha, as of a neutral under the law of blockade. But the argument is supposed to be equally applicable to all these captures. In the conclusion of this opinion, it is said: "All the cases before us in which the capture occurred before the 13th of July, 1861, for breach of blockade or as enemies' property, are illegal and void."

The case of the Amy Warwick and that of the Crenshaw differed essentially from the cases arising on the question of the blockade. The question involved in the former cases was not of the rights of neutrals, but of the rights of citizens of a State of the United States, as against the powers of the general government. And when, in these cases, the courts of the United States took the position of *Prize* courts in reference to ships and cargoes belonging to such citizens, without waiting for any legislation by Congress, which must be supposed to have had power fully adequate to place the rights and obligations of such citizens within the reach of *municipal* law,[2] and applied the *international* law of mari-

[1] See *ante*, p. 17, note, as to Judge Grier's view of the relation of the States.

[2] This had in fact been done, before this case arose, by the Act of Congress of July 13, 1861, 12 U. S. Stat. 255 (*ante*, p. 58), sec. 6 of which "forfeits any ship or vessel, belonging in whole or in part to a citizen or inhabitant of the interdicted State or district, found at sea or in any port of the United States. The forfeiture applies to the loyal as well as the disloyal citizens in the disaffected district." Judge Nelson, in the charge to the Grand Jury, Nov. 4, 1861, 5 Blatchford's Circuit Court, 551. Congress might have enacted a municipal law of prize as to property of residents of the eleven States at sea. As also showing that, at the time, no notice was taken in the discussion of any distinction in the law applicable to these several cases, it may be proper to point out that the only arguments of counsel given by the reporter are those of Mr. Carlisle for the claimants in the case of the Brillante, a neutral trader, for breaking blockade, the vessel and cargo be-

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time capture as of enemies' property,[1] on the ground of an existing *belligerency*, those courts recognized the eleven *States* of the Confederacy as a nation at war, more fully and precisely than was done by any foreign proclamation of neutrality.

But the same confusion of thought and failure to observe the political distinction in the recognition of belligerency, which are so noticeable in the Prize Cases, prevailed through the war. This is to be traced in the history of the so-called Confiscation Acts of Congress, and in the decision of cases founded on them, and in the claim made by the President for legislative power by Emancipation Proclamations.

The property intended to be affected by the various statutes, commonly called Confiscation Acts,[2] was property belonging to private citizens, being residents of certain States or districts. These statutes were not, apparently, framed to reach property to be taken as belonging to a political personality to whom the law of conquest in relation to public property might be applicable. There is no reference in these statutes to either any States, or any confederacy of States, as liable to the loss of public property by conquest.

There are, however, some cases in the reports which,

ing Mexican, and that of Mr. Dana for the libellants in the case of the Amy Warwick, property of an American citizen seized on the high seas as enemy's property. These four cases were argued, both for the libellants and the claimants, by different counsel. As all the arguments could not be given, the reporter stated only those which "came to his hands in a form which relieved him of the labor which the others would have cost to re-write and condense them." 2 Black, 639. The arguments, so selected as representing opposite sides, respectively related to two distinct questions.

[1] Mr. Dana, in his edition of Wheaton, p. 375, in note 153, already cited, says, in reference to all these maritime captures: "Congress passed no laws establishing any new principles or rules respecting condemnation; and the prize courts proceeded entirely upon the rules of international law."

[2] See references to these statutes, *ante*, pp. 59, 62.

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though they relate to seizures or confiscations by the government of the United States following upon the rebellion, must yet be distinguished from the cases depending entirely on these Acts of Congress.

In United States, Lyon, *et al. v.* Huckabee, 16 Wall. 414, certain real estate situated in Alabama, known as the Bibb County Iron Works, had passed from the possession of private owners to that of the Confederate government and been used, during the war, as a foundry for cannon, &c. This property had been occupied by the military forces of the United States, and, after having been taken possession of by the Treasury department, as captured and abandoned property, had been sold at public auction. Afterwards, a release of any interest of the United States in the property, was given to the purchasers, Lyon *et al.*, by an Act of Congress, Dec. 15, 1866, Laws of 39th Congress. 15 U. S. Stat. Private Acts, p. 40.

In the opinion of the court, delivered by Mr. Justice Clifford, without dissent, it is said, 16 Wall. 434: —

"They claimed title under the United States, and the record shows that the title of the United States was derived by conquest from the government of the late Confederate States. Our military forces captured the property while it was in the possession of the Confederate States as a means for prosecuting the war of the rebellion, and it appears that the captors took immediate possession of the property and continued to occupy it under the directions of the executive authority until the government of the Confederate States ceased to exist and the unlawful confederation became extinct, when it was sold by the orders of the executive, and conveyed to the plaintiff claimants.

"All captures in war vest primarily in the sovereign; but in respect to real property, Chancellor Kent says, the acquisition by the conqueror is not fully consummated until confirmed by a treaty of peace, or by the entire submission or destruction of the state to which it belonged, which latter rule controls the question in the

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case before the court, as the confederation having been utterly destroyed no treaty of peace was or could be made, as a treaty requires at least two contracting parties. Power to acquire territory, either by conquest or treaty, is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined, but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror. Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government, or, in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation, or state. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even debts as well as personal and real property.

"Tested by these considerations, it must be assumed for the further purposes of this investigation that the title acquired by the plaintiff claimants from the United States was a valid title." [1]

The same doctrine was pointedly stated by Judge Bradley in the Fifth Circuit, in The United States *v.* A Tract of Land, 1 Wood, 475, in which instance the question was as to the claim to one half the proceeds, by the informer.

"Bradley, Circuit Justice. The land in question in the case was seized for confiscation under the acts of Aug. 6, 1861, and of July 17, 1862. The information alleges that it had been conveyed to the Confederate States government for the purpose of aiding the insurrection. If this were the case, it became the property of the United States government by right of conquest, *ipso facto;* that government succeeding to all the property held by the Confederate States government. The United States needed no proceedings for confiscation or forfeiture. They had plenary title and right of possession, if not actual possession, without any such

[1] In this case, anomalous in the matter of practice at least, if not in matter of principle as well, the defendant Huckabee, as the owner in fee before the property had passed to the Confederate government, was the claimant, and the court below had given a decree in his favor.

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proceedings. It cannot be presumed that Congress intended to authorize a proceeding to forfeit or confiscate the government's own property, and divide the proceeds with the informer. Such a proceeding must be regarded as supererogatory and void."

The seizure or acquisition judicially sanctioned in these cases is to be distinguished from any confiscation of the property of private persons, not only by its appearing to involve the assertion of a conquest in the technical sense, but also by the recognition of the Confederate government as a political personality in international relations, that is, a political personality capable as such of holding property by a right which could pass over to the conqueror by international law.[1]

The cases in the United States Circuit Court, Eastern District of Virginia, Aug. 2, 1877, known as the Virginia Gold Cases, United States *v.* Smith, and ten other similar cases, 1 Hughes, 347, involve the question of conquest of *the State*. These were for money distributed among the defendants by themselves, being officers of "the government of Virginia under the Confederacy" "on or about the 2d day of April, 1865, which was the day preceding the occupation of Richmond by the Union army." The facts were undisputed, and the question was on demurrer to the declaration. The Reporter states, ib. p. 349, —

"As the suit against William Smith, the then governor, involved a sum large enough to authorize it to be carried to the Supreme Court, that has been heard first, and the others will be stayed to

[1] The claim of the government of the United States to property, which had been held in England as property of the Confederate government, rested upon a right essentially the same as that which was asserted in these cases. But as, in that instance, it was necessary to support the claim against persons who were not subject to its own legislative power, the cases in which it was made presented a somewhat different question for judicial decision. These cases, The United States *v.* Prioleau, 2 Hemming & Miller, 559, and The United States *v.* McRae, 8 Law Rep. Equity Cases, 69, cannot be called cases of *confiscation*, and will be noticed hereafter in a different connection with the question of a conquest.

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await the result, in order that the principle which may be settled in it may govern the other cases."

In the close of the opinion delivered by Judge Hughes overruling the demurrer and sustaining the right of the United States to appear as plaintiff, it is said, ib. p. 355,—

"As to the proposition of defendant's counsel, that the war of the United States was not against the insurgent government of Virginia, and that the overthrow of that government was not a conquest, but only the setting aside of one government, and the assumption of its functions by another, it can hardly find acceptance in view of the facts of history. The event happened at the close of a frightful war, and was directly produced by arms, and by armies in the field. The power of the United States was directed against the insurgent State governments, even more than against their confederated authorities. The war was conducted for the overthrow of those governments. When *they* were crushed, the war ceased, and the historical fact of conquest cannot be changed or obliterated by the employment of theoretic paraphrases in speaking of it. As to the insurgent State governments, it was a conquest, and was followed by the legal results of conquest. This debt is due. It is due to some rightful claimant, and I think the law makes it sufficiently apparent who that claimant is. The demurrer must be overruled."

The so-called Confiscation Acts were proposed and accepted in Congress, and defended before the courts,[1] as legitimate applications of the law of international warfare; novel applications, perhaps, of its principles; but still, actual discoveries like patentable utilizations of virtues long latent in well-known acids and alkalies, which, as such, would stand on record in international jurisprudence as precedents for the customary law of nations applied in war between independent states, the *jus belli* as recognized by the rest of the world.

But this pretension was based on the discrimination of

[1] See the cases, *ante*, pp. 62–79. A still more recent exposition of the *rationale* of the two Acts of Congress may be found in the United States *v.* Winchester, 9 Otto, 375, opinion by Waite, Ch. J.

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something more than a *de facto*, or temporarily insurrectionary, power. These measures presupposed a belligerent antagonist exercising sovereignty, as internationally recognized, and determining rights of persons and property by its own municipal law. The individual private persons whose property was to be affected by these statutes were to be discriminated, not by their personal acts or sentiments, but by the fact of their being subjects or citizens of enemies' country.[1]

In this pretension, therefore, was involved the recognition of the eleven States as belligerent *de jure;* a recognition, of itself, contradictory of all right in the government to treat the war as one instituted to suppress the rebellion of private individuals.

If, however, it be thought necessary to form a judgment of the actual value of this claim of discovery of a "war power" capable of general application as between nation and nation, when belligerent, it will be fair reasoning to test it by its possible application in the supposed instance of wars between two nations whose absolutely distinct independence has never been controverted.

In the instance of war between two of the great Powers of Europe, is the case legitimately supposable that the legislatures of the two countries should pass laws[2] authorizing

[1] Compare the reasoning in the extracts from the opinions of the court, *ante*, pp. 65, 70, 71, 72.

[2] The question is of *legislative* confiscation as something quite distinct from seizure by a purely military usage; as was shown in Planter's Bank *v.* Union Bank, 16 Wall. 483. In reference to an order by the general in command at New Orleans, it was said, in the opinion of the court, by Mr. Justice Strong, ib. 495. "It was simply an attempt to confiscate private property which, though it may be subjected to confiscation by legislative authority, is, according to the modern law of nations, exempt from capture as booty of war. Still, as the war had not ceased, though it was not flagrant in the district, and as General Banks was in command of the district, it must be conceded that he had the power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of the government, or by the effect of Congressional legislation. . . . But admitting,

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their respective armies to seize the property of subjects of the other which, as simple property, could contribute to the country's resources, whether *real property* or personal, and sell the same, privately or at public auction, divesting, in the case of real property, the former title, under the local municipal law, and creating a new title to be valid, as if under the same municipal law, when the hostile force acting under this extraordinary, extra-municipal legislation should have retired from the country?

May it be supposed that, under the legislative power of the public enemy, the property of any or all who may have engaged in the defence of their country in war against him, in either civil or military functions, will be liable to confiscation and sale; immovable property as well as movable? Will the palaces, mansions, farms, houses, hovels, of all connected with the government, from the sovereign down to the lowest official, be liable to be permanently divested by such legislation? If this "war

as we do, that private property remained subject to confiscation, and also that the proclamation applied exclusively to inhabitants of the district, it is undeniable that confiscation was possible only to the extent and manner provided by the Acts of Congress. . . . They designated government agents for seizing enemies' property. . . . The system devised was necessarily exclusive. No authority was given to a military commandant, as such, to effect any confiscation. . . . Those enactments declaring that private property belonging to certain classes of persons might be confiscated, in the manner particularly described, are themselves expressive of an intent that the rights of conquest should not be exercised against private property except in the cases mentioned, and in the manner pointed out."

Mr. Justice Bradley dissented from the judgment, arguing ib. 504: "The officer in command of the armies of the United States, after the possession of New Orleans had been secured, required debtors in New Orleans of creditors in the enemy's lines to pay such debts to the proper receiving officer of the army. That the debts due from the citizens of a belligerent State to the citizens of the State with whom the former is at war may be confiscated is undoubted international law. If such confiscation is, in fact, made by the military authorities, and if the action of those authorities is assumed or confirmed by the sovereign authority, the confiscation is perfect. . . . In my judgment, such a disposition of the case would better accord with the principles of international law, and the mutual rights and relations of all the parties concerned."

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power" exists in respect to immovable property, it is important for conveyancers to know whether its effects continue beyond the duration of the hostile occupation.[1]

The joint resolution which was adopted by Congress at the date of the passage of the Act of July 17, 1862 (*ante*, p. 64, note), and was accepted by Mr. Lincoln, as "substantially one" with the statute, when he approved and signed both (see Message of same date), was understood to have been passed in view of objections which he had prepared to state on returning the bill, without signature, and which were founded on art. iii., § 3, cl. 2, of the Constitution.[2]

[1] Dana's Wheaton's Int. Law, 8th ed. pp. 432–444, editor's note, 169, *Conquest and Belligerent Occupation*, which bears on many of the points noticed in this chapter; p. 437, under *Belligerent Occupation*, (4) *Immovable Property*. In reference to *public lands* appropriated by the conqueror: "As his occupation is subject to the chances of war, so is his title to what he cannot remove and corporeally make his own. He cannot, therefore, give to another a permanent title to public lands. . . . As to private property in immovables, the occupying power is not considered, in the modern practice of nations, as authorized to confiscate their use and income. He may make such use of them as the necessities of war require, and subject them to taxes and contributions; but the mere fact of military occupation does not work a transfer of the uses or income of private lands, or authorize such a transfer to be, in fact, made."

[2] "No attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attaintable." See Macpherson's Hist. Rebellion, 197; Bigelow *v.* Forest, 9 Wall. 341; Day *v.* Micou, 18 Wall. 160; Confiscation Cases (Slidell's land), 20 Wall. 92, a case from the Fifth Circuit, 1 Woods, 221.

In the opinion of the court in Wallach *v.* Van Riswick, 2 Otto, 208, it is said by Field, J., "It was not doubted that Congress might provide for forfeitures effective during the life of the offender. The doubt related to the possible duration of the forfeiture, not to the thing forfeited or to the extent and efficacy of the forfeiture while it continued." Under a municipal law, the children, if also guilty of treason, would always be equally punishable, by loss of estate, with their ancestor. But under this ingenious blending of a proceeding *in rem, jure belli*, with municipal law, the children, who may have been the more active in treason, would have their inheritance secured to them by the confiscation of his estate, *flagrante bello*, for the lifetime of their parent.

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But all belligerent nations cannot be expected to limit themselves by the Constitution of the United States. It is easy to understand that while a region is occupied by a victorious enemy he may protect whom he will in the possession of any real property, and that, on his withdrawal, the holder under him should not be liable, in the courts of the country, as trespasser, or for use during the hostile occupation. But it can hardly be supposed that any absolute title in fee, or for a life, or for years, could be recognized under the local municipal law; at least, in the absence of some treaty stipulation.[1]

Is it to be supposed that hereafter, in the case of wars carried on with a nation possessing districts rich in cotton, or other commercial staple, such as tobacco, rice, sugar, or coffee, the judicial officers[2] of the other belligerent

[1] Dana's Wheaton's Int. Law, editor's note, 169 (p. 442): "Postliminy is applied to all lands; for the belligerent occupant does not acquire absolute title to them, but only the usufruct." I have not found any allusion to the operation of this principle in any of the cases relating to confiscation under these Acts.

[2] In section 6 of the Act of March 12, 1863, it is made the duty of any soldier or sailor in the service, "who may take or receive any such abandoned property, or cotton, sugar, rice, or tobacco, from persons in such insurrectionary districts," to turn it over to the agents, &c. Under section 8 of the Act of July 2, 1864, the government agents were authorized to use the proceeds of property seized, in purchasing other "products of the States declared in insurrection" for subsequent sale, — at a profit to the government, — as may be assumed. But, otherwise, the acts of Congress did not discriminate any particular kind of property. In Young *v.* United States, 7 Otto, 58, Waite, Ch. J., said: "The authority for the capture of the cotton was not derived from the law of Congress, but from the character of the property, it being 'potentially an auxiliary' of the enemy, and constituting a means by which they hoped and expected to perpetuate their power." Referring to Chase's opinion in Mrs. Alexander's cotton, *ante*, p. 66. This "peculiar character" of cotton is a judicial discovery. In the opinion of the court by Miller, J., in Sprott *v.* United States, 20 Wall. 468, it is said, "It is a fact so well known as to need no finding of the court to establish it, a fact which, like many other historical events, all courts take notice of, that cotton was the principal support of the rebellion, so far as pecuniary aid was necessary for its support."

In Rothschilds *v.* United States, 6 Ct. Cl. 204, the property seized was tobacco.

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must regard such staple product as property of a "peculiar character," or as "hostile property," or as property which is "potentially an auxiliary of the enemy;" so that, within the reach of such military forces, all purchase and trade in such property, even by subjects of neutral nations, shall be void, and all such property shall be liable to seizure for the general purpose of disabling the enemy, and to sale for sustaining the general military treasury of the captor?

Or is the law of civilized warfare, as expounded by the United States, to be hereafter that all movable property on enemies' territory, of any kind, shall be liable to seizure by the hostile forces, — whether owned by public official, or private citizen; by man, woman, or child; native citizen, or subject of some neutral nation, who may be found dealing or trading in such enemies' jurisdiction.[1]

In the application of the so-called Confiscation Acts, two questions have arisen involving the recognition of principles of international jurisprudence.

1. How far such legislation could affect the rights and obligations of non-resident aliens; that is, of aliens residing in foreign neutral countries.

[1] In a dissenting opinion by Mr. Justice Field in Sprott *v.* United States, 20 Wall. 468, it is said: "They [the United States] have never asserted [?] any greater rights arising from capture of property on land in the hands of citizens engaged in the rebellion than those which one belligerent nation asserts with reference to such property captured by it belonging to the citizens or subjects of the other belligerent. All public property which is movable in its nature, possessed by one belligerent, and employed on land in actual hostilities, passes by capture. But private property on land, except such as becomes booty when taken from enemies in the field or besieged towns, or is levied as a military contribution upon the inhabitants of the hostile territory, is exempt from confiscation by the general law of nations." See Wheaton, Int. Law, § 346, and Mr. Dana's edition, note 169, *Belligerent Occupation* (6); Halleck's Int. Law (edition, 1861), p. 456. The opinion delivered for the court by Mr. Justice Field in Dow *v.* Johnson, 10 Otto (100 U. S.), 158, and the dissenting opinion of Clifford and Miller, J.J., may be of interest in this connection.

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2. How far such legislation could affect the rights and obligations of resident aliens, that is, aliens residing within the limits of the United States; meaning the eleven States of the so-called Confederacy, as well as any other part of the United States.

In the cases of La Plante, 6 Ct. Cl. 319; of Harrison, ib. 323; and of Hill, 8 Ct. Cl. 470, the claimants were French and English subjects residing, during the war, in their respective countries, who sued for the proceeds of cotton seized or captured under the so-called Confiscation Acts, which had been previously purchased, on their account, through agents within the limits held at the time by the Confederate force. These claims were contested on the part of the government, on the ground that, under the circumstances, such aliens could not acquire a valid title to the cotton; at least, not as against the United States. The court, however, recognized the validity of the purchase, and sustained the claims under the statutes.[1]

In two of these cases, that is in Harrison's case and Hill's case, one of the members of the court, Judge Nott, dissented, on the ground that the claimants' purchase of cotton was, if not criminal, at least illegal, as "a traffic carried on in defiance of the municipal law and public policy of the United States," which, for that reason, should not be recognized in any court of the United States, and especially not in the Court of Claims, under the condition stated in the third section of the Act of March 12, 1863, the "Captured and abandoned property" Act (*ante*, p. 67, note) because the act of purchase gave "aid and comfort" to the rebellion, whether the non-resident alien purchaser could be criminal in such purchase or not. 6 Ct. Cl. 327.

[1] In the Ouachita Cotton cases, 6 Wall. 529, the claim of an alien resident in France was disallowed because of want of title in the party of whom he had purchased the cotton in New Orleans while occupied by the government forces. It was not denied that such neutral might have purchased cotton from any one in the districts held by the Confederate force.

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In the case of Collie *v.* The United States, 9 Ct. Cl. 431, the claim was by a British subject residing in England during the war, for cotton purchased in the Southern States, and with proceeds of blockade-running voyages. In the opinion of the court, delivered by Judge Loring and sustaining the claim, it is argued that the words "aid and comfort to the rebellion," as used in the statute, must be supposed to relate to a crime, and not to an act, and that, as the non-resident alien could not be chargeable criminally, the clause could be no bar; and that, if the statute imputed a crime in such case, the claimant must, by consequence, be entitled to the benefits of amnesty which should remove his disability; on the authority of Carlisle *v.* United States, 16 Wall. 147, *post*, p. 189.

Judge Nott dissented in this case, not only on the ground previously taken by him as to all purchases within the districts held by the rebel forces, but also because, in this instance, the claimant had been engaged in running in goods through the blockade.[1] He also held that the statute must be taken to refer to an act, independently of any criminality of the actor, and that, because not punishable for the act as a crime, a non-resident alien could not have the benefit of the amnesty.[2]

The case of Young, assignee of Collie, 97 U. S., 7 Otto, 39, appears to have been the same case on appeal from the Court of Claims.[3] But the decision of the Supreme Court, Field, J., dissenting, was against allowing the claim under the Acts of Congress.

In each of the two courts, the case was taken to depend on the question whether Collie should be held to have

[1] In Bates's Case, 4 Ct. Cl. 569, the claimant, who was held to have given aid and comfort by running the blockade, was a citizen of South Carolina.

[2] See also the opinion of the court delivered by Judge Nott, in Green's Case, 6 Ct. Cl. 420.

[3] Though the findings of facts, in regard to the importation of contraband of war, differ.

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given aid and comfort to the rebellion, according to the intent of the words used in the statute.

In the opinions delivered for the Court of Claims, by Judge Loring, and for the Supreme Court by Chief Justice Waite the charge of giving aid and comfort is presented as depending on the position of non-resident aliens in furnishing munitions of war to the Confederacy. The decision in the claimant's favor, by the Court of Claims, as turning on the finding that the claimant had "imported goods, *not* munitions of war," 9 Ct. Cl. 447, 449, and the decision against him by the Supreme Court, on the finding that he had imported cannon, &c., 7 Otto, 43–46. The two courts may therefore be taken to have agreed in holding that dealing in contraband of war, under the circumstances, should exclude the claimant.

In these opinions, it is intimated, by the argument, rather than squarely asserted, that this case, or this question of giving aid and comfort to the rebellion by a non-resident alien, was to be determined on principles equally applicable to the position of neutrals in any war between two independent nations.[1]

It is said by Chief Justice Waite, 7 Otto, 63, —

"A non-resident alien need not expose himself, or his property, to the dangers of a foreign war. He may trade with both belligerents, or with either. By so doing, he commits no crime. His acts are lawful in the sense that they are not prohibited. So long as he confines his trade to property not hostile or contraband, and violates no blockade, he is secure both in his person and his property. If he is neutral in fact as well as in name, he runs no risk. But as soon as he steps outside of actual neutrality, and adds materially to the warlike strength of one belligerent, he makes himself correspondingly the enemy of the other. To the extent of his acts of hostility, and their legitimate consequences, he submits himself to the risk of the war into whose presence he voluntarily

[1] Compare 9 Ct. Cl. 447–449; 7 Otto, 60, 63.

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comes. If he breaks a blockade, or engages in contraband trade, he subjects himself to the chances of capture and confiscation of his offending property. If he thrusts himself inside the enemies' lines, and for the sake of gain acquires title to hostile property, he must take care that it is not lost to him by the fortune of war. While he may not have committed a crime for which he can be personally punished, his offending property may be treated by the adverse belligerent as enemy property. He has the legal right to carry, to sell, and to buy; but the conquering belligerent has a corresponding right to capture and condemn. He enters into a race of diligence with his adversary, and takes the chances of success. The rights of the two in law are equal. The one may hold if he can, and the other seize.

"Collie, having been a non-resident alien, was not a traitor; but in his foreign home he seems to have done as much as any one person could do to aid and assist the insurgents in their struggle for supremacy."

It is not clear whether the Chief Justice intended to hold neutral carriers of contraband to a different moral standard, in case of civil wars, from that applicable in ordinary war; nor yet whether he even accepted the doctrines usually received, as to trading in contraband, in case of war between two belligerent nations.[1]

In caption 5 of the report of the case of the Peterhoff, 5 Wall. 28, this proposition, "the conveyance by neutrals to belligerents of contraband articles is always unlawful," is given as the doctrine of the case. But the language of Chief Justice Chase delivering the opinion, ib. 56, does not justify this, — "We know of but two exceptions to

[1] Although the claimant, Collie, had sent out cannon, &c., *as a gift* to the Confederate government, it is doubtful whether this action should have been discriminated in the American courts from *trade* in contraband. Such a distinction is not made in the above opinion; and it seems doubtful whether any service rendered *in his own country*, by the subject of a neutral nation, to one belligerent, can be held a hostile act in the law courts of the other. The only redress in such case would be by application to the government of such neutral.

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the rule of free trade by neutrals with belligerents; the first is that there must be no violation of blockade or siege; and, second, that there must be no conveyance of contraband to either belligerent."

The same judge, in The Bermuda, 3 Wall. 551, said: "So too, except goods contraband of war, or conveyed with intent to violate a blockade, neutrals may transport to belligerents whatever belligerents may agree to take."

But these citations are only loose and misleading expressions of the doctrine that a belligerent has the right to seize vessels and cargoes attempting to run his blockade, or found on the high seas carrying munitions of war to the other belligerent; while, on the other hand, neutrals have the right to do either; subject to the risk of capture under his right. There is no unlawfulness in the act, on their part.[1]

It must be clear that, in the case of war between two distinct nations, the legislative authority of neither belligerent could affect the rights and obligations of the subjects

[1] "There is nothing in our laws, or in the law of nations, that prohibits our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure, which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation," Story, J., in The Santissima Trinidad, 7 Wheat. 340, — the "confiscation," that is to say, of the particular vessels and cargoes seized in such commercial adventure; that is, in the act, or *in delicto*, as the phrase is, Wheaton's Int. Law, § 506, though there is no criminality, or *delictum*, in the act. This is eminently *American* doctrine. "The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act." 1 Kent's Com. 145. The application of this in the instance of civil wars has always been asserted diplomatically by the United States. See the correspondence cited by counsel for Collie, the claimant, in 8 Ct. Cl. 434; Lawrence's Wheat. Int. Law, p. 846, note 241 by the editor.

The same doctrine was very fully stated, with special reliance on American authorities, by Lord Chancellor Westbury in *Ex parte* Chavasse, re Grazebrook; a case arising from the civil war in America. See The Jurist, vol. xi. pt. i. 1865, p. 400; and by Dr. Lushington, ib. p. 1025; and the citations in the argument for Collie, 9 Ct. Cl. 432–445.

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of neutral nations, residing in their own country, to deal with the other belligerent nation; or could do so only as far as might be done in the application of the powers incidental to belligerency, in respect to blockade, search for, and seizure of contraband of war, &c., on the high seas.[1] In such case neutrals, residing in their own country, who voluntarily abet or give encouragement to one of two such belligerents cannot be regarded as public enemies by the other belligerent.

In the opinion of the court delivered by Chief Justice Waite, in Young, Assignee of Collie, *v.* United States, 7 Otto, 62, it is said, —

"There can be no doubt that the words 'aid or comfort,' are used in this statute in the same sense they are in the clause in the Constitution defining treason (art. 3, sec. 3), that is to say in their hostile sense. The acts of aid and comfort which will defeat a suit must be of the same general character with those necessary to convict of treason, where the offence consists in giving aid and comfort to the enemies of the United States. But there may be aid and comfort without treason; for 'treason is a breach of allegiance, and can be committed by him only who owes allegiance, either perpetual or temporary.' United States *v.* Wiltberger, 5 Wheat. 96. The benefits of the statute are withheld not for treason only, but for giving aid and comfort as well. A claimant to be excluded need not have been a traitor, it is sufficient if he has done that which would have made him a traitor if he had owed allegiance to the United States.[2]

[1] See the doctrine fully set forth in the opinion of the court by Chase, Ch. J., in The Bermuda, 3 Wall. 514, in which case the argument and decision condemning the vessel was entirely based on grounds applicable to neutrals in the case of war between independent nations. See also Judge Loring, opinion in Collie *v.* United States, 9 Ct. Cl. 447, and Field, J., opinion in Carlisle *v.* United States, 16 Wall. 154.

[2] The reference is to the Act of March 1863, sec. 3, 12 U. S. St. 820, in which the words "aid and comfort" are employed. These are technical terms, long used to describe a certain crime *in subjects as against their sovereign.* It might be urged that, as a non-resident alien cannot commit treason, he cannot give that "aid and comfort" which defines treason. Allegiance is essential to such "aid and comfort." But in sec. 12 of the Act of March 3, 1863, 12 U. S.

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It would appear therefore that the decision of the Supreme Court sustained the view taken by Judge Nott in the Court of Claims; that is, that non-resident aliens may be judicially known as having given aid and comfort to the rebellion.

In the case of any supposable rebellion, the sovereign whose authority is resisted may prefer to rely upon the ordinary methods of municipal jurisdiction, civil and criminal, as the means of sustaining such authority. In such case, aliens, though residing in foreign and neutral countries, cannot do, by their agents residing within the jurisdiction of that sovereign, what those agents could not do for themselves; and, in so far as they should, by those agents, engage in enterprises forbidden by the municipal law of that sovereign, their rights of property cannot receive the protection of that law.

But the obligation of such aliens to conform themselves to this is not founded on any allegiance on their part, but solely on the presumption that the authority of that sovereign is adequate to protect all rights of person and property within a particular territory, and if the legitimate sovereign should be unable to give them, as such

St. 767, amending the Act establishing the Court of Claims, it is provided that "in order to authorize the said court to render a judgment in favor of any claimant, whether a citizen or not," it must be set forth in the petition that such claimant has not in any way voluntarily abetted or given encouragement to rebellion against the said government of the United States; which allegation may be traversed by the government, and if, on trial, such issue shall be decided against the claimant, his petition shall be dismissed." The words "voluntarily abetted or given encouragement to rebellion" are less technical and of broader signification, and such as might be more effective to sustain the argument in this opinion, and in those of Judge Nott in the Court of Claims, that the intention of Congress was not to exclude only such persons as could be chargeable for an illegal act, but also any who, in any part of the world, had abetted or encouraged that which the government here regarded as rebellion. May it be supposed that, in the case of claimants being foreigners who had, at home, written or spoken on this subject, the court would take testimony as to the effect of their opinions?

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aliens on whose allegiance he has no claim, that protection, by reason of the adverse insurgent force, he cannot hold such aliens responsible in violating any legislation intended to suppress such rebellion by restricting such commercial intercourse.[1] And, even if this were doubtful, if he assumes the position of a belligerent power, in relation to the rebel antagonist, in order to exercise the rights of blockade, search, and seizure of contraband of war, on the high seas, as against subjects of other nations who, in the pursuit of their own interests, may assist the insurgents by trading with them, such sovereign can have, as against such aliens, only the same rights which he would, as a belligerent power, have in case of war with an independent nation. In imposing upon such aliens the liabilities of neutrals in an international war, such a sovereign accords also to them the rights of neutrals in such a war.[2]

[1] The American government never undertook to enforce section 4 of the Act of July 13, 1861, which contemplated the closing of ports, not in its possession, against any ship or vessel from beyond the United States. England and France informed the Secretary of State that they would consider such a decree null and void, and that they would not submit to measures taken on the high seas in pursuance of such decree. Lawrence's Wheat. Int. Law, p. 555; editor's note 175, referring to Parliamentary Papers, 1862, North America, No. 172, Lord Lyons to Lord John Russell, Aug. 12, 1861; Dana's Wheat. Int. Law, p. 687, editor's note, 239, *Municipal Surveillance*.

[2] In La Plante's case, 6 Ct. Cl. 321, the cotton claimed had been purchased by an agent residing in Carolina for the claimant, a French subject residing in France. It was said for the court, by Judge Milligan: "At the time of the appointment of Henderson, as the agent of the claimant, there was no law in force in the United States that interdicted trade between a neutral and resident citizen of the national or insurrectionary States; and none could have been enacted without at least great injury to the nation, and perhaps giving just ground of offence to neutral powers. But, however this may be, and we do not undertake to decide it now, the blockade was set on foot to meet this very difficulty, by cutting off free intercourse between neutral powers and the insurgent States. What was its effect?" &c. See also argument for the counsel for the claimant, ib. 312. "In general, a neutral merchant trading in the ordinary manner with a belligerent country, does not, by the mere accident of his having a stationed agent there, contract the character of the enemy." Phillimore, Int. Law, pt. ix. c. vi.

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Neither, therefore, in case of belligerency being recognized in civil war, can aliens residing in other countries be held responsible by either belligerent party, for any thing they may do for the interest of the other; except as they might equally be responsible as between two belligerent nations, under the laws of international warfare. They take only the risks which exist in that case, and, as far as they are concerned, neither party is more rebel or more sovereign than the other; and, as to them, neither party more than the other can be both belligerent and sovereign.[1]

sec. 85. Judge Nott's argument in his dissenting opinions, 6 Ct. Cl. 827, 8 ib. 472, appears to be that, the agent being a citizen of the United States, the neutral could not do by him what the agent could not do for himself. But, if this were correct, there must be a difference as to the position of neutrals, in the case of an ordinary war and of a civil war. To deny neutrals in an ordinary war the right to employ agents in the territory of either belligerent would be denial of all neutral trade.

[1] In Green's case, 8 Ct. Cl. 420 (Dec. 1872), *post*, 190, Judge Nott said of this class of cases, affecting non-resident aliens, — "It remains to be determined whether a personal disability to maintain an action exists in the absence of crime, or whether the statute intended to create a trust for the benefit of non-resident aliens who violated their obligations of neutrality by giving aid and comfort to the rebellion." But, if there was any neutrality in the case, it was that neutral nations did not undertake to discriminate the belligerent parties as being, the one — the sovereign, and the other — the rebel. The decision in the case of The Georgia, 1 Lowell, 96; 7 Wall. 32, in which the vessel, which had been an armed cruiser under a commission from the Confederates, had been seized on the high seas, after having been sold to a British subject in the port of Liverpool, rested on the proposition that a neutral purchaser must be held to have known that the Confederate flag was as good a flag to fight under as was that of the United States. If the vessel had been a pirate, with no claim to a national flag, it could not have been seized after such a sale. If the American government had not accepted this position, the sale of the vessel, in a foreign port, could have been rendered illegal only by some previous legislation as to sales of American ships abroad, or some notice given to foreign nations, and it is doubtful whether such legislation or notice would have been recognized by any foreign country which had asserted a position of neutrality, as if between two nations at war. By this seizure, the American government defined the position of neutral nations as much as it had been by the British Proclamation of May 13, 1861, *ante*, p. 56.

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The clause in the Act of Congress under which this claim was presented makes no distinction, in respect to their residence, among claimants who are *not* citizens. By the decision rendered in this case, the Supreme Court takes the position that in case of civil wars the subjects of neutral nations, residing in their respective countries, may be judicially distinguished in the courts of one of the belligerent parties as having given aid and comfort to rebellion against such belligerent.[1]

There may be some doubt whether the court has professed to base this decision on a doctrine as to the obligations of subjects of neutral nations in case of any international war, or on a doctrine applicable exclusively in civil wars.

But if the actions judicially distinguished as giving aid and comfort to a rebellion are such as neutrals are competent to perform in the case of war between two independent nations, it may be essential that foreign governments should determine for themselves, whether the antagonist recognized as belligerent was a confederacy of States having *de jure* the political capacity to wage war, or was an insurrectionary *de facto* belligerent.

In the cases of Carlisle and Henderson, 6 Ct. Cl. 398, 8 id. 153, and Carlisle *v.* United States, 16 Wall. 147, the claim was for the proceeds of cotton taken, as belonging to the parties being "subjects of the Queen of Great Britain" residing in Georgia before and during the war, and proved to have engaged in the manufacture of salt-

[1] If this is the true doctrine of modern international jurisprudence, it may be important that it should be more generally known in those places where a very large proportion of the people make it a matter of pride and principle to exhibit a chronic sympathy with every revolt against established government in other countries. Judge Sprague in the Amy Warwick, 2 Sprague's Decisions, 186, was careful to recognize "that moral right of revolution which belongs to all subjects," and the same solicitude may be found in many other judicial opinions upholding the action of the government against the rebellion.

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petre, purchased of them by the Confederate government for the manufacture of gunpowder. It was decided in the court below and in the Supreme Court, on appeal, that these resident aliens could sustain their claim under the statutes by receiving, as citizens in the rebellion received, the benefit of amnesty under the proclamations, for having given "aid and comfort" to the rebellion; that is, in each court it was held that aliens resident in the southern States could be chargeable, for such action, with the crime of treason against the United States.[1]

This view was reaffirmed in the Court of Claims by the decision of Green's case, 8 Ct. Cl. 482, in which the claimant was a British subject domiciled in Savannah during the war, and who, in the report, is not stated to have participated in the rebellion or given it aid or assistance otherwise than by continuing his residence there during the war.[2]

[1] In Collie *v.* United States, 9 Ct. Cl. 452, Judge Loring remarked, — "The application of the argument of the defendants that we are called upon by them to make is, to refer the words of the statute, as to aid and comfort to the rebellion, in the cases of our own citizens and aliens resident here and owing allegiance here, exclusively to the crime and not at all to the act; and in the case of aliens, not resident here and not owing allegiance here, exclusively to the act and not at all to the crime."

[2] The opinion for the court was delivered by Judge Nott, who in the other cases had held non-resident aliens chargeable for aid and comfort to the rebellion. In this case, Judge Nott yielded to the authority of Carlisle *v.* Henderson; but, for himself, took the ground that resident aliens were in the same position in these cases as non-resident aliens; that is, were excluded from the benefit of the amnesty, because never chargeable for *crime*, though liable to exclusion of their claim for giving aid and comfort. Denying, apparently, "the amenability of a resident alien to the law of treason, as to which I supposed [he says, ib. 419] that there was not a lawyer in the world who could entertain a doubt," — on the ground that the authorities make "the allegiance reciprocal to the protection," and that the rebellion made that protection impossible. But this is no more true of the *resident* alien than of the native citizen. The *territorial* jurisdiction determines the allegiance in the case of each. The relations of persons who owe no allegiance *by their residence* are those as to which the question of protection or no protection is material. *Ante*, p. 186. The doctrine in Carlisle *v.* Hen-

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Importance of the Distinction in case of Aliens.

In the case of any supposable rebellion, the subjects of foreign States who may be residing within districts occupied by insurgent forces which, as such, and only as such, may have received recognition, as a belligerent *de facto*, from the belligerent claiming to be the actual sovereign, will not be protected by such temporary belligerency from responsibility to that actual sovereign. Though they owe no natural allegiance to such sovereign, as do the native or naturalized inhabitants, they owe a temporary or qualified allegiance, and for aid rendered to the insurgents, though recognized belligerents, they may be charged with treason as if native or naturalized.[1]

But the subjects of neutral nations who, during a war between two belligerent *nations*, may be within the territorial limits of either of such nations cannot be held individually responsible, in their persons or their property, to the other belligerent for any thing which they may do contrary to the policy or interest of such belligerent; except as the native subjects of the country in which they are living may be equally responsible under the laws and usages of war; even though the persons and property of such aliens, if resident or domiciled, are not specially protected by international law against the legislation of such belligerent when in hostile occupation of the country in which they may then be.[2]

derson, as to allegiance due from alien residents in one of the Southern States, was reaffirmed by the Supreme Court in Radich *v.* Hutchins, 5 Otto, 210.

[1] In the opinion delivered by Mr. Justice Field for the court in Carlisle *v.* United States this doctrine of allegiance of the alien resident in the insurrectionary districts is assumed rather than shown. It is there taken on the authority of the opinion in Hanauer *v.* Doane, 12 Wall. 847, — "That he who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow," &c. But in that case the party was a citizen of one of the Southern States.

[2] Phillimore Int. Law, p. ix. c. vi. sec. 85; Wheaton, Int. Law, Dana's ed. secs. 318–335, Lawrence's ed. 557–576. In United States *v.* Diekelman, 2 Otto, 520, the defendant with his vessel, under the German flag, came

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Importance of the Distinction in reference to Aliens.

Hence it may appear that, in cases where aliens residing within the limits held by the confederacy were concerned, it was material to determine whether the belligerent recognized as the antagonist to the United States was a confederacy of States, each capable by its political nature of carrying on war, or was an insurgent force having no such political character, and being only belligerent *de facto*.

For, though neutral nations can have neither rights nor obligations in reference to the view taken by the government of the United States of the allegiance of native or naturalized citizens of the eleven States, the question whether subjects of neutral nations, temporarily resident in those States, can be chargeable with treason against the United States and suffer loss of property, under the punitive legislation of the United States for the suppression of a rebellion, depends upon the question whether such aliens and the governments of their respective countries had the right to consider those *States* as the belligerent at war with the United States, or were bound to know that there was no belligerent, as against the United States, other than a body of insurgents recognized only as a temporary and *de facto* power with belligerent rights.[1]

within the territory which neutrals could not regard as a distinct country from the United States after its occupation by the national military forces; even though the civil authority had not been there restored. Even while under martial law, that law was, as to neutral nations, part of the municipal law of the United States; the recognition of the rebel belligerency having then terminated as to the district so occupied; and, therefore, the return cargo of the Prussian vessel was subject to the port regulations instituted by the military authority; irrespectively of the provisions in the treaty with Prussia protecting trade in contraband of war. See opinion of the court by Waite, Ch. J.

[1] The application of such maxims as *ex turpi causa, ex dolo malo, non oritur actio*, where aliens are concerned, will depend on this matter of political fact. Compare, for illustration, the arguments and decisions in the case of Coppell *v.* Hall, 7 Wall. 542, in the Supreme Court on error from the Circuit Court for the Eastern District of Louisiana.

The distinction would also be important in the case of aliens who might have shipped on vessels commissioned as cruisers by the Confederate

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Importance of the Distinction in reference to Aliens.

It could be urged with propriety that by the Act of Congress establishing the Court of Claims, and by the various Acts amending that Act,[1] the court is one of special and limited jurisdiction, which is further restricted by the terms of the "Confiscation Acts," in reference to claims under them, and that the court is bound to interpret strictly the words defining its jurisdiction. Still, it may be supposed that the claims of non-resident aliens against the government of the United States, similar to those in the cases here cited, should be presented, diplomatically, through their own governments,[2] and in some of these it

authority. Compare Dana's Wheaton, p. 198, editor's note 84, as to debate in the House of Lords, May 16, 1861, arising on the President's proclamation of April 19, 1861, respecting "any person acting under pretended authority of the States in rebellion and molesting vessels of the United States would be held amenable to the laws of the Union for the prevention and punishment of piracy." 12 Stat. U. S. p. 1258, Appendix, No. 4.

[1] See the proviso in sec. 12 of Act of March 3, 1863; *ante*, p. 185, n. 2. The Act of July 27, 1868, sec. 2, 15 Stat. U. S. 243, accords the right to proceed against the United States *through this court*, to "aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts." There must be some little question of the correctness of Judge Nott's dictum in Harrison's case, 6 Ct. Cl. 327, and 8 Ct. Cl. 472, that "aliens, non-resident, have no right to resort to the courts of a country, and they come in only by treaty or through international comity," unless it is understood that such international comity is part of the common law. Comp. Wheaton, Int. Law, secs. 140, 141.

[2] In Hill's case, 8 Ct. Cl. 473, Judge Nott said, — "The claim is not within the intent of the statute, and the claimant, if entitled to relief, should have sought it through his own government." Art. xii. of the treaty of Washington, 17 U. S. Stat. 867, is a limited provision for some of such claims. Judge Nott, 9 Ct. Cl. 454. In Young *v.* United States, 7 Otto, 67, it is said by Chief Justice Waite, repeating the doctrine of his opinion in United States *v.* Diekelman, — "If his property was captured by the United States, under circumstances which entitled him to require its restoration, the law of nations gave him the right to prosecute his claim through his own government for the loss he sustained. That right was not taken from him by the Abandoned and Captured Property Act. It was open to him from the first moment of the capture. All that he had to do was to induce his government to assume the responsibility of making his claim, and then the matter would be 'prosecuted as one nation proceeds against another, not by suit in the courts, as matter of right, but by diplomatic representations, or,

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may be material to decide whether the belligerent antagonist to the United States during the war was to be regarded by the neutral governments *as States*, belligerent by political capacity, or an insurrectionary *de facto* belligerent.

The position of any non-resident alien would be the same under either view; that is, if, as is here supposed, the obligations of neutrality are the same in a civil war as in any other. But the distinction would be material in the case of aliens residing in the limits of the eleven States.

In the case of aliens resident in the part of the United States not affected by the rebellion, it is clear that they stood in the same position as the native or naturalized citizens of the United States residing in the same place. The temporary allegiance due from them, while under the territorial jurisdiction of the United States, made them equally subject to the municipal law of the place, and equally liable to the charge of treason for dealing with the belligerent enemy; whether the enemy recognized was the States in their political capacity, or a body of insurgents as a temporary *de facto* belligerent.[1]

The doctrines of public law which have here been applied to test the political right of the so-called Confiscation Acts may also be appealed to in judging of the actual

if need be, by war.' In such case 'it rests with the sovereign against whom the demand is made, to determine for himself what he will do with it. He may pay or reject it; he may submit to arbitration, open his own courts to suits, or consent to be tried in the courts of another nation. All depends upon himself.' United States *v.* Diekelman, 92 U. S. 520. This was the only right Collie had when his cotton was taken, and the United States have never consented to grant him any other. While the President, by his pardon, may restore lost rights, it has never been supposed that in such a way he can grant new ones."

[1] Habicht *v.* Alexander's Ex'r, 1 Wood, 412, decision by Judge Duval, 5th Circuit. The contract for cotton, in Texas, by the plaintiff, being an alien resident in New York, held void under the non-intercourse Act.

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force to be ascribed to the President's Emancipation proclamations.

These have been generally understood as resting on the supposed existence of a power, *jure belli*, in a military commander, when in an enemy's country, to determine the personal status of any natural subjects of that enemy who had been held in any state of involuntary service; and to determine it in this sense, that, not only would the doctrine of postliminy have no effect to restore the previous status of servitude of those persons who might, during the war, be within the actual control of such military commander; but such military order should, as municipal law, apply to any persons in like condition within the territorial limits of such enemy's country, without reference to the actual extent of military operations, and also entirely aside from any existing or prospective change of dominion by conquest.

This was an assumption, as to the existence of a doctrine of international law, for which no proof had been given at the time.[1] But, even if the supposed doctrine

[1] It may be supposed that, if any offer of such proof had been known, it would have been noticed by Mr. B. R. Curtis, in the pamphlet entitled "Executive Power," which first appeared in October, 1862, and which is included in the memoir of the author by his son. In this it is said: "The only supposed source or measure of these vast powers appears to have been designated by the President, in his reply to the address of the Chicago clergymen, in the following words: 'Understand, I raise no objection against it on legal or constitutional grounds; for, as commander-in-chief of the army and navy, in time of war, I suppose I have a right to take any measure which may best subdue the enemy.' This is a clear and frank declaration of the opinion of the President respecting the origin and extent of the power he supposes himself to possess; and, so far as I know, no source of these powers, other than the authority of commander-in-chief in time of war, has ever been suggested." Memoir of B. R. Curtis, &c., vol. ii. 317. As to any proof afterwards offered I do not know any more considerable than that in "A Letter to Curtis in Review of his Pamphlet on the Emancipation Proclamation," New York, 1863, by C. P. Kirkland, p. 7. "What then, if we were at war with a foreign nation immediately on our borders, and that nation had within its bosom millions of slaves? Can any one versed in the slightest degree in the

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were recognized, it could be applicable only in the case of a war between belligerents, being such *de jure*, or being each at war in virtue of independent political power, and the assumption of such a power was, as has already been argued in connection with the so-called Confiscation Acts, inconsistent with the action of the government in treating secession as rebellion.[1]

But if international jurisprudence is destined to receive any important accession from the precedents thus offered[2] by the several departments of our government, it may be anticipated that its delegates sent to conventions to be held in Frankfort, for the exposition and humanization of

principles of the law of nations, and the laws of war, for a moment doubt our *right* to declare and proclaim freedom to those slaves in case that nation did not discontinue that war within a prescribed period?" Nobody could dispute the *right* "to declare and proclaim" that, or any thing else. The question is whether any effect follows under the law of international warfare. Mr. James Reddie, of Scotland, known as an author of several works on public law, of high repute, in an article in the Anthropological Review (Edinburgh, 1864), vol. ii. p. 292, took the ground that there was no such effect.

[1] For this reason there was a contradiction even in Mr. Lincoln's proclamation, Jan. 1, 1863. "By virtue of the power in me vested as commander-in-chief of the army and navy of the United States in time of actual rebellion against the authority and government of the United States."

It may be now decent to assume that Mr. Lincoln credited himself with the possession of the power claimed by these words, though much of his previous action might show that he could not have had any very strong conviction on that point. See, especially, an article, "The Emancipation Proclamation," by James C. Welling, in the North American Review, February, 1880.

If Mr. Dana's remarks headed "Slavery under Belligerent Occupation," in note 169 (8) to § 348 of his edition of Wheaton's Int. Law, are to be understood as intended to support that claim of power, I do not know of any which has been more successful. Mr. Lawrence, in his edition of the same work, vol. ii. pp. 597–617, has collected many other opinions supporting his own conclusions against the doctrines asserted to maintain the Emancipation Proclamations and the Confiscation Acts.

[2] "As the Act was designed to introduce the principle of confiscating enemy property seized on land, like that seized on water," &c., Mr. Justice Miller, *ante*, p. 73. "There is, so far as we are aware, no similar legislation mentioned in history." Chase, Ch. J., *ante*, p. 75.

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international law, will have been fully instructed to present the doctrine in all its bearings for the enlightenment of their European associates, and that in due time it will find its way into the ordinary books on the subject.

It is superfluous to discuss here such inquiries, because, as already stated, even if the existence of such powers under the rules of international warfare be admitted, the circumstances in which they should be applied are not to be found where the belligerent enemy recognized is only so *de facto*, — an insurrectionary force, beginning with and ending with the duration of military operations.

On the review of cases in the Supreme Court, arising under the so-called Confiscation Acts, in the second chapter it was inferred that the majority of the court did not consider their provisions as punitive municipal law, or as derived from power to punish treason and rebellion vested in the legislative department by the Constitution, but accepted this legislation solely on the doctrine of a war-power.[1]

There may possibly, however, be some question as to this, and it may perhaps be still argued that this legislation is not to be regarded as solely dependent upon the war power as above set forth, that is, as applicable in any international war, but rests upon a "peculiar position"[2] occupied by the government in this instance, as claimed by Mr. Chief Justice Waite in Lamar *v.* Browne, 2 Otto, *ante*, p. 78, so that they "could act both as belligerent and sovereign," and that it was only when so belligerent and sovereign that the claim would be made, and therefore not in the case of war with a foreign nation.

In this argument, the powers of a belligerent in inter-

[1] Compare *ante*, pp. 70, 79.

[2] According to other decisions it is the peculiar character of the property, or being "hostile property" by its nature which makes the difference. See *ante*, p. 66, 77.

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national warfare with parties who are not his subjects are supposed to be superadded to the powers of a sovereign over his subjects.[1] Many of the provisions in these statutes could not be derived either from the law of war or from the powers granted to the government under the Constitution. Provisions in the nature of municipal law which could not have been framed under the Constitution are incorporated into the law of war, and then applied as ordinary legislation.[2]

But neither by addition nor by multiplication can such combination of powers exist where two powers are antagonistic; so that the occasion for one class of powers excludes the occasion for the other. To say that the inhabitants of the eleven States were alien enemies at the very moment when they were rebels is a contradiction in terms.

The government of the United States might be, as was claimed, both belligerent and constitutional sovereign. But the only use of belligerent rights compatible with sovereignty over the antagonist was that which, while sufficient as to neutrals, was limited by the disability to accord a political status to those known only as a *de facto* military

[1] "For the enforcement of their constitutional rights against armed insurrection they had all the powers of a most favored belligerent," Waite, Ch. J., 2 Otto, 195, *ante*, p. 78. Compare Field, J., in Tyler *v.* Defrees, *ante*, p. 73.

[2] "The laws alluded to would seem to be obnoxious not only to the violation alike of the principles of international law and of the Constitution of the United States, whether we regard them as intended to apply to belligerents or to rebels, but they blend all distinctions between the two systems, proposing to enforce rights founded exclusively, if they exist at all, on war, through process applicable only to times of peace. In other words, as, while an adverse possession of the seceded States exists, all legislation there would be inoperative, these enactments, based on belligerent claims, are made to apply after the war-power has ceased, and which, even on the supposition that the territory is thereafter to be regarded as a conquered country, and not to revert to its former condition as States of the Union, would be the exercise of a severity unknown to modern civilization." Lawrence's Wheaton's Int. Law, p. 605, editor's note.

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power.[1] The belligerent right which was alone adequate to support any such legislative powers, as were claimed, presupposed the recognition of the eleven *States* as the antagonist belligerent, and of their citizens as alien enemies to the United States, capable, by their character as such, to wage war against the United States, but at the same time incapable of occupying the position of rebels as to the United States or their government.[2]

In the assertion, so frequently made in the cases arising out of the war, that the government possessed the powers both of a belligerent and a sovereign, it seems to have been supposed that the legislative power of any sovereign in respect to any subjects in rebellion is augmented, in recognizing their belligerent status, through his own assumption of the position of a belligerent.[3] The fact, on

[1] By making this distinction, a sufficient answer may be given to the strictures offered in the House of Lords, May 16, 1861, by Lords Kingsdown and Cranworth, and the Lord Chancellor (Westbury), to the effect that the government of the United States ought not to claim the rights of a belligerent as against foreign commerce, by search and blockade, and yet treat the rebels as traitors. Dana's Wheaton Int. Law, editor's note, 84 (p. 198).

[2] There could be no more "war-power" over slavery, in the case of war with another nation, in Congress than in the President. Therefore the emancipation founded on the forfeiture of the owner's right, as provided by sec. 4 of the Act of Congress of August 6, 1861, 12 Stat. U. S. 319, was equally without support from any doctrine of war powers as previously known in international law.

[3] In his opinion in the Amy Warwick, Judge Sprague had asserted the existence of a new sort of belligerency, one in which the rights were all for one party, and the liabilities all for the other. "They [the rebels] are both belligerents and traitors, and subject to the liabilities of both; while the United States sustains the double character of a belligerent and a sovereign, and has the rights of both. These rights coexist, and may be exercised at pleasure." 2 Sprague's Decisions, 182. This dictum seems to have given the key-note for many later judicial voices. The sovereign's rights, as to rebel subjects when belligerents, are supposed to be derived from international law, though greater than any claimed in a war between two nations. In the Confiscation cases (Fifth Circuit, Slidell's land), 1 Wood, 229, Judge Bradley said: "A belligerent has a right to take such course and impose such conditions, with regard to the confiscation of enemies' property, as it sees fit. The rules which it prescribes are not to be questioned by any

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the contrary, is that, whatever powers such sovereign may have, as belligerent, in respect to such subjects, they are inferior to those he already has as sovereign. The belligerency of the rebel force is a diminution, for the time, of his legislative power, to which he is compelled to submit. The power which a sovereign gains, under these circumstances, is gained in respect to neutrals, in situations to which his sovereignty cannot extend in time of peace.

If it be once conceded that the government of the United States occupied the position of sovereign in respect to the inhabitants of the eleven States, all the peculiar reasoning as to "peculiar property" and "peculiar situation" is superfluous. The difficulty has been in trying to reconcile pretensions to powers, like those claimed in the Confiscation Acts and the Emancipation Proclamations, with the assumed continuance of the eleven States as political personalities.

It may have been commonly argued that the confiscation legislation of Congress, and the Emancipation by proclamation of the Executive, were essential measures for suppressing the rebellion. This is an argument which assumes the right and duty of the government to resist secession as rebellion; an assumption which, whether well founded or not, must now be accepted because, as political fact, secession has been resisted as rebellion. But the

code except the law of nations and its own Constitution. The rights of a government against its own citizens in insurrection are not less, but are rather greater, than those it may exercise towards a foreign enemy. But, in either case, the enemies' property may be confiscated simply as such, if the government so determine." And in another passage, — "It may be very true, and I am inclined to think it is true, that the constitutional provision which declares that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted, does not apply to the confiscation of enemies' property, even though those enemies be rebels against the government and guilty of treason." Ib. p. 233. In this logical fallacy, international, municipal, and constitutional law are involved in inextricable confusion.

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general position of *necessity* is one which no government existing under *law*, — a written constitution in this case, — has a right to assume. A necessity for violating the Constitution in order to maintain the Constitution is contradiction.[1] And the argument is not bettered in the least by calling it the necessity for preserving "the integrity of the Union," or "the life of the nation," or "the national existence." If the limitations imposed upon a government holding delegated powers are inconsistent with attaining these great objects, they are not the objects for which such government was instituted, and the necessity cannot be supposed.[2]

But under that view of the effect of the State ordinances of secession, supported to the extent of civil war, which I have presented in beginning this chapter, the municipal laws of the eleven States continued in force only as laws deriving their validity from the sovereign represented exclusively by Congress, and all rights of persons and property, real or personal, existed therein subject to the legislative power of Congress, limited only by the provisions in the Constitution of the United States; as the powers of the pre-existing State governments had been limited by the State constitutions; and, as to subjects of foreign countries, by the law of nations. There was ample room for legislation, as efficacious as any contained in the Confiscation Acts, for the purpose of suppressing and punishing rebellion.

This legislative power, thus ascribed to Congress under the theory of State-lapse, is entirely distinct from any claim of a "war-power" legislation, such as was advanced

[1] Which is answer enough to all such reasoning as that of Mr. Justice Miller in Tyler *v.* Defrees, *ante*, p. 72.

[2] As in Mr. Lincoln's arguments for military emancipation, *ante*, p. 195 *n*. The argument for war-power confiscation acts, and war-power emancipation, is equivalent to saying that, in order to suppress a rebellion it is proper to resort to measures which declare that it is no rebellion at all.

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to support the Confiscation Acts, and such as might with equal consistency have been claimed for Congress in reference to the emancipation of the slaves in the States affected by the rebellion.[1]

This legislation of Congress, being simply in the nature of ordinary municipal statute law for Territories of the United States, could be so framed as to apply to any or all property, real or personal, and to any or all persons found in the districts to which such legislation should be directed; to resident aliens, as well as to others. And there would be no room for questions with neutral nations as to the rights of their subjects being such resident aliens in these districts, such as might arise in the case of aliens, subjects of neutral nations, being within the territory of one nation, during a war, or upon a conquest, as against the belligerent or political rights of another, and might arise if the eleven States were to be considered as conquered in an international war.

Congress therefore, under this view, had the power over the *status* of all natural persons within the eleven lapsed States, as in the case of an organized Territory of the United States, and any legislation by proclamation on the part of the Executive was usurpation of a function

[1] As was, I believe, claimed by Mr. Sumner. Any legislative power arising from an existing belligerent *status* is obviously a different matter from any power vested in Congress, by the Constitution, to create a state of belligerency, or to recognize a state of belligerency, either in a civil war or a public international war, which was questioned in the Prize Cases, *ante*, p. 50. The fact that it takes two parties to make a war, as it takes two to make a bargain, creates a necessary limitation, in two opposite directions, on any power of Congress to "declare war." It is clear that no legislation of one party can institute a war if there is no other party who will fight; and, also, that if there is a party who is able and willing and does invade the country, there will be war, though Congress may have said nothing about it. The power specified in the Constitution to "declare war, grant letters of marque and reprisal, and to make captures on land and water," Const. Art. 1, § 8, could only have relation to war, &c., as between nations. A constitutional arrangement for declaring a civil war is as contradictory as superfluous.

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vested in another branch of the government; independently of the facts that there was no foundation, such as was claimed for the power, in the law of international war, and that, if such could be found, there was no such international war in this instance as could give occasion for its application.[1]

A doubt as to the person recognized as belligerent, *i. e.*, whether a political person capable of carrying on war, or a body of men risen in arms without political status, must necessarily have involved uncertainty on the question whether any private persons, being citizens or residents of one of the eleven States had been chargeable with treason.[2]

According to the view taken in this chapter of the political consequences of the State ordinances of secession and civil war, there could be no recognition of the eleven *States* as the belligerent party, and hence, there could have been no necessary exemption in the case of their citizens, as individuals, from the charge of treason against their only sovereign, — the United (other) States.

At the same time, it may be admitted that though the recognition of belligerency should be thus limited in legal effect, it would still be just, for the sovereign represented

[1] The question of limitation on the power of Congress over a Territory, in respect to slavery, is one under the written Constitution as law for the organized government. This is a distinct matter from the question of the investiture of that sovereign power from which that written Constitution derives its authority, and which is the topic herein considered. So also the questions whether, when the United States are engaged in any war, the guarantees of the Bill of Rights for the liberty of the private citizen may be disregarded throughout the country by the military authority; whether the writ of *habeas corpus* is suspended, *ipso facto*, by the existence of war; or, whether, if to be suspended otherwise, its suspension rests with the President, as head of the army, or with Congress, are questions under the written Constitution as law, and might equally arise under any theory of the ultimate possession of sovereignty. Compare B. R. Curtis, pamphlet on Executive Power, Memoirs, &c.; *Habeas Corpus* and Martial Law, by Joel Parker, North Am. Rev. vol. 8, p. 471; Lawrence's Wheaton's Int. Law, editor's note, 170.

[2] Compare *ante*, pp. 60, *et seq.*

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by the actually prevailing government, in determining how far the right to punish individual citizens should be exercised, to consider the degree in which the populations engaged in insurrection or rebellion had approached the status of an actual political power, as deriving legitimacy from force alone.[1]

But that inquiry could not be entertained by judicial tribunals deciding guilt or innocence of individual citizens as a question of law. It is a political faculty, which could only be exercised by the government, either through the executive or the legislative function.[2]

It has already been noticed that no judicial exposition of the law of treason applicable to the circumstances of the rebellion has hitherto appeared;[3] and it is now almost impossible that any case giving the opportunity for such an exposition should arise. The question of treason or no treason has been practically left to the vaguest standards of popular sentiment.

On this question of treason, as against the United States, or the government, it seems to have been popularly held

[1] In many of the judicial opinions delivered in the cases which have herein been cited, the dimensions, so to speak, of the rebellion have been dwelt upon as adding to the crime of individuals on the one hand, and to the just rights of the government on the other. This sort of reasoning, which is quite in accord with popular sentiment, shows a misapprehension of the case; it really being one not simply under a municipal law. The greater the dimensions of civil war, the more it acquires the character of international war; the bigger a rebellion, which is an unsuccessful revolution, the more it approaches a revolution, which is a successful rebellion; and the less the crime in the individual citizen.

> Bella per Emathios plus quam civilia campos,
> Jusque datum sceleri canimus.
>
> *Lucan, Pharsalia*, Lib. i., l. 1, 2.

[2] Const. Art. ii. § 2; 1. "He [the President] shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." In United States *v.* Klein, *ante*, p. 75, the Supreme Court maintained the power as against Congress.

[3] *Ante*, p. 80.

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that the crime of the State, as political person, is also the crime of its citizens, individually; or of those, at least, who could be proved to have voluntarily engaged in the State's act of levying war against the United States, or in giving aid and comfort to such State as a belligerent. It has been thought perfectly consistent to hold the State responsible, either under the laws of public war, as conquered nation, or as having, under the public municipal law (*i. e.*, the Constitution), forfeited, by rebellion as political person, its participation in representation, &c., and, at the same time, to regard the citizens, acting in obedience to or by the authority of such State, as individually chargeable with treason, when the war had ended by the conquest of such State.[1] This is sustaining something in the nature of contradiction in terms. The *State*, as political person, was what it was in virtue of its political capacity to command the obedience of its citizens. It could not, *as State*, have been *belligerent*, except by having this capacity in the relations which constitute *war*. If it had this capacity, the citizen had not freedom of choice, and cannot be accountable in his own person. This is not so much doctrine of law, as it is only statement of axioms underlying all legal relations.

But, in the case of belligerency attributed to a merely insurrectionary power, the question of treason of citizens is a legal one, properly so called; while the extension of amnesty to individuals — if determined by the degree in

[1] When this had been very forcibly pointed out in an article on "American Secession and State Rights," by an English contributor in the (London) Law Magazine and Law Review for August, 1863, it was further illustrated in letters written in answer by Judge Isaac S. Redfield, and Mr. George S. Hillard, published in the same magazine in November, 1863, and February, 1864, and reprinted in the Monthly Law Reporter (Boston) for August, 1864, N. S. vol. xxvi. p. 70, 361, each containing a defence of the American position from the standpoint of Story and Webster. Another illustration may be found in the same volume, p. 537, in the article entitled "The Legal Status of the Rebel States before and after their Conquest."

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which the recognized military force had acquired, as far as these individuals were concerned, the powers of a political state — is a political question.[1]

Under the feudal system, the vassals of a feudatory in rebellion against his lord-paramount would not have been exculpated from the charge of treason against the latter by their fealty to the former. It would have been held that, by breach of his own allegiance, the feudatory lost his claim, as the representative of his superior, of fealty from his vassals, and that these then became the immediate vassals of the lord-paramount. But there is no similar relation between the several States, the corporate political peoples of the several States, or their State governments on the one hand, and the general government on the other; nor any such as between the individual States on the one hand, and themselves united on the other;[2] and

[1] See the history of the trials for piracy, during the war, of persons on the rebel cruisers. Dana's Wheaton, Int. Law, editor's note, 84, *Rebels as Pirates*. Lawrence's Wheaton Int. Law, editor's note, 79.

[2] Mr. J. P. Bishop, author of treatises on Marriage and Divorce, and on Criminal Law, published in 1865 a pamphlet, "Secession and Slavery," &c., in which it is said, p. 27: "These States are, as they always were, bound by law to render allegiance to the United States; *it is a fact of the law* that they are so bound." Compare, *ante*, p. 145, note, a citation from Brownson and remark. In the article in the Monthly Law Reporter, "The Legal Status of the Rebel States," &c., already referred to, occurs this passage, — "The people are by our Constitution clothed with the power of self-government; it is their franchise. If this franchise, this right of governing, belonged to a single person, called a prince or duke, and he had rebelled against his suzerain, can there be any doubt that he would have forfeited to his superior his franchise, his right of government, by this act of disloyalty, when conquered by his suzerain? History is full of such forfeitures. The people here stand in the place of the duke, and shall they not forfeit their franchise, their right to govern themselves, by a like act of disloyalty and rebellion? It would be strange if such were not the law."

In the case supposed, the forfeiture is entirely independent of any question of conquest. In fact, there is no *conquest* when the suzerain establishes his authority. In this curious assertion that "the people stand in the place of the duke," it is not explained who it is who stands in the place of the suzerain. Probably the author had the *fetish* Constitution before his mind, as such suzerain.

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the doctrine of the Supreme Court, as to the continuation of their State existence, if it means any thing, and the attribution of belligerency to *the States*, suppose them to have continued in the exercise of all their political capacity in respect to their populations.

The feudal lord-paramount was an actual human being, individually and physically distinct from his vassals. But the *government* of the United States is no such person. Presidents, Congress, the judiciary, as men, have no sovereignty, and, as a whole, the *government* cannot exist except as the States exist first. The human beings holding sovereignty are the politically organized people, corporately organized as States United.[1]

The common idea may still be that the eleven States could be, and *therefore* should be, and were the recognized belligerent.[2] This was the view, unquestionably, which the British government, in perfect good faith undoubtedly, took in the Queen's proclamation of neutrality, and this also was accepted by other countries.

But strangers may be at least excused in seeing us as we see ourselves. If we propose to be true to ourselves, we must, in our domestic political law, insist on the distinction; or, otherwise, wallow in the chaos of contradictions in which the Supreme Court is floundering like Milton's Satan on his way to the terrestial paradise.

The judiciary has been forced to these inconsistencies by the original failure on its own part, as on the part of the executive and of Congress, to make the distinction, as

[1] *Ante*, p. 140.

[2] This view has even got formal expression in treatises. Dr. Woolsey, in Political Science, ii. p. 250, says of the general government: "It has thus, if there should be serious resistance to the laws or any movement of violence in which a State is concerned, the power to treat such State as in a condition of war, to close its harbors by a blockading force, to stop communications with it by the post-office, or in any other way, to pour troops into its territory."

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already shown. Mr. Lincoln might possibly have modified his view as the question of reconstruction proceeded, from having, perhaps, originally had a somewhat different view of the Union from that ordinarily accepted. President Johnson, whose reconstruction policy was essentially the same as Mr. Lincoln's, was supposed to be of that school which, accepting the several sovereignty of the States as the primal fact in the genesis of the Union, accepts, about half way, its logical consequences. Congress had blundered in the same way in its Confiscation Acts, and, so far as it accepted the doctrine of conquest in the *Reconstruction measures*, followed Mr. Johnson's lead in the view taken of the action of the eleven Southern States, though it may be a question, as between them, who had the best claim to consistency.

The joint committee of the first session of the 39th Congress, commonly known as the Committee on Reconstruction, had been appointed under direction, Dec. 13, 1865, "to inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress.

In the majority report of this committee, from which some passages have already been herein cited, it is said respecting the state of opinion at the South, —

"Professing no repentance, glorying, apparently, in the crime they had committed, avowing still, as the uncontradicted testimony of Mr. Stephens and many others proves, an adherence to the pernicious doctrine of secession, and declaring that they yielded only to necessity, they," &c.

And further on in the same report, —

"While there is scarcely any hope or desire among leading men to renew the attempt at secession at any future time, there is still, according to a large number of witnesses, including A. H. Stephens, who may be regarded as good authority on that point, a generally

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prevailing opinion which defends the legal right of secession, and upholds the doctrine that the first allegiance of the people is due to the State and not to the United States. This belief evidently prevails among leading and prominent men, as well as among the masses, everywhere, except in some of the northern counties of Alabama, and the eastern counties of Tennessee." Reports, 1st Sess. 39th Cong. Vol. 2, pp. xvi., xvii.

Surely any foreign observer must smile at the innocent simplicity of the committee in reporting this, as an unexpected phenomenon, or dreaming that anybody could possibly have believed them, if they had reported the Southern people as entertaining an opposite view of the political right of the question!

The South, being defeated on the "wager of battle," simply left the victorious party to carry out whatever political doctrine they might have been sustaining. If it was material for Congress to learn, at that time, anybody's views about the doctrine of secession, it should have appointed a committee to proceed through the Northern States asking this question of each resident inhabitant, man, woman, or child,—

In the event that the State of which you may be an inhabitant, acting with ten bordering and contiguous States, should be considered by the government of the United States as at war[1] with that government, or with "the United States," as represented by that government, would you, acting conscientiously in view of your allegiance as citizen, adhere to and give aid and comfort to the general government, or would you adhere to and give aid and comfort to your State?

How would such a question addressed to each citizen, man-citizen or woman-citizen, of the Northern States, at

[1] *At war*; that is with all those consequences to the inhabitants of your State which follow from the view of belligerency sustained by the Supreme Court in the Prize cases and the Confiscation cases.

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the date when the Reconstruction committee were making up their majority and minority reports, have been answered?

It is a question of a sort supposed to be always promptly answerable, and one which none who undertake to govern a country ought to be afraid to ask.[1]

[1] The persons whose answer on this question would be material are not only those who might have the occasion to vote on a question of secession by having the elective franchise. The appeal contemplated is not made to any "people" as the corporate source of political power; it is to all who, because they must individually owe allegiance to some sovereign, must be capable of being charged for treason to that sovereign, whoever that may be. And this applies without reference to distinctions of sex, age, physical strength, wealth, education, &c. The influence of woman has always been a marked characteristic in civil wars, and, if correctly reported, it was a strong element at the South in favor of the secession movement.

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CHAPTER VI.

THE SUBJECT OF THE LAST CHAPTER CONTINUED. — THE POLITICAL ACTION OF THE GOVERNMENT IN RECONSTRUCTION EXAMINED AS A RECOGNITION OF THE EFFECT HERE ASCRIBED TO THE SECESSION ORDINANCES.

IT is hardly necessary to search the opinions delivered by the several justices of the Supreme Court in the cases cited in the first and second chapters for passages illustrating their general recognition that the question of the status of the eleven States was in its nature a political question and, for that reason, not such a question as could be determined by the court by being comprehended in the description — "all cases arising under the Constitution," — in the clause describing the jurisdiction of the Supreme Court.[1]

In the State of Georgia *v.* Stanton, 6 Wall. 50, argued December Term, 1867, a bill in equity had been filed, April 15, 1867, in the name of the State to enjoin the Secretary of War, and other officers representing the executive authority of the United States, "from carrying into execution certain Acts of Congress, inasmuch as such execution would annul and totally abolish the existing State government of Georgia, and establish another and

[1] Compare *ante*, pp. 17, 19. Abbott's National Digest, V. (published 1877), p. 446, has, under *States, Reconstruction*, only this: "The constitutionality and effect of various Acts of Congress for the Reconstruction of the former seceded States, elaborately examined and considered, 1867. The Reconstruction Acts, 12 Op. of Att.-Gen. 141; 1867, The Reconstruction Acts, Id. 182." From which it would appear that all that a diligent lawyer can find on this important subject is to be sought in the opinions of a member of the Executive Department of the government, the Attorney-General (Henry Stanbery), on certain questions of interpretation of the Acts of Congress, as to which the "military commanders" had asked for instruction.

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different one in its place; in other words, would overthrow and destroy the corporate existence of the State by depriving it of all the means and instrumentalities whereby its existence might, and otherwise would, be maintained."

Mr. Justice Nelson, in delivering the opinion of the court as to this, said, ib. p. 76: —

"This is the substance of the complaint and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these Acts of Congress, which, it is charged, if carried into effect by the defendants, will work this destruction. But they are grievances because they necessarily and inevitably tend to the overthrow of the State as an organized political body."[1]

It would appear that in this statement the court went even beyond the allegations in the bill itself, which complained of the prospective effect on the *government* of the State, whereas, here, the court seems to acknowledge that the execution of the Acts of Congress was incompatible with the political nature of a State of the United States.

The conclusion of the court, ib. p. 77, was: —

"That these matters, both as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights, for the protection of which our authority is invoked, are the rights of sov-

[1] Chief Justice Chase was alone in expressing dissent from the opinion delivered for the court by Mr. Justice Nelson. He said: "Without being able to yield my assent to the grounds stated in the opinion just read for the dismissal of the complainant's bill, I concur fully in the conclusion that the case made by the bill is one of which this court has no jurisdiction." It may easily be conceived that the Chief Justice, with such ideas as to State-continuance as he afterwards expressed in Texas v. White, *ante*, pp. 10, 14, would not be likely to agree that there was any possible "overthrow of the State as an organized political body," whatever might be the action of the general government in respect to the territory and population.

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ereignty, of political jurisdiction, of government, of corporate existence as a State with all its constitutional powers and privileges. . . . Having arrived at the conclusion that the court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief," &c.[1]

This case of Georgia *v.* Stanton differed from the cases which have been cited in the first and second chapters in this, — that the rights for the protection of which the authority of the court was invoked in those cases were rights of persons or of property, as referred to by Mr. Justice Nelson in his opinion in this case. By entertaining jurisdiction in those cases, the court necessarily accepted any political facts upon which such rights might depend; and so, if it did not *decide* the political question, it furnished evidence of what was the political fact which had been established by the action of "the political department," wherever that department might be found.

All, then, that is material to learn is, What did the court accept as the political fact? As a court, the judges had declared their acceptance of the political transaction known as *Reconstruction* as being something for which they, as a court, had no judicial responsibility. It may, for the present purpose at least, be assumed that the Supreme Court did not accept it as successful usurpation, or as a revolutionary change, but as consistent with that investiture of sovereignty from which the written Constitution had derived its authority for the members of the court as well as for others, and that this was so, whether the court held that "the political department" had treated the eleven States as always States, each being on an equality

[1] From the language of the same judge in *Re* Egan, *ante*, p. 44, note, it appears that he had an opinion on the political question of State-existence which he could express in a case where the rights of persons depended on such question. Compare, also, Grier, J., with Swayne and Miller, JJ., in Texas *v.* White, *ante*, pp. 17, 18, and Swayne, J., in White *v.* Hart, *ante*, p. 19.

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with any one of the other States, or had treated them as something else.[1]

Several of the justices, a majority of the court probably, have indeed indicated their views on this alternative by saying in very positive terms that these States were always and must be always States. Passages may be cited from opinions delivered in the cases already described which may be thought to indicate that, in recognizing the existence of a power in Congress adequate to sustain its action in Reconstruction, the court has ascribed it to the constitutional guaranty of a republican government,[2] and that this, of itself, is an acknowledgment of the continuity of State existence. But those allusions to the guaranty appear to be quite as applicable to the case of the organization of territory which has never been under a State government, and are therefore not inconsistent with the recognition, in this case of reconstruction, of either the theory of conquest or of State-lapse.

So far as the Supreme Court has designated these States as the recipient of the guaranty, it has done so either —

1. In that sense of the word *State* which Chief Justice Chase, in Texas *v.* White, called "the primary conception of a people or community," — "the people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser and less definite relations,"[3] *ante*, pp. 10, 11; or else —

[1] The court had no political *doctrine* to accept from the "political department," for Congress had merely offered to it a *fact*, without describing its political nature.

[2] Contained in Sect. 4 of Art. IV. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and, on the application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."

[3] Which was, apparently, also Mr. Justice Bradley's idea in saying: "Whether the community of people constituting the several States remained

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2. As Mr. Justice Swayne, in White *v.* Hart, described the State of Georgia, that is, as a political personality owing "constitutional duties and obligations" to somebody, and liable to such "disabilities and penalties" as might be "visited upon her" by somebody "for her share of the guilt of the Rebellion," and of receiving at last "condonation by the general Government." (*Ante*, pp. 18, 19.)

The first of these descriptions, as applied to the eleven States, is rather more in harmony with a doctrine of State-lapse, or State-suicide, than with any other.

It being assumed that no member of the Supreme Court has taken the ground that, at some period between the end of the war and the date of these cases, a revolution had occurred, changing entirely the previous relations between the States and the general Government and, simultaneously, the allegiance of each inhabitant of the United States, it seems to me that Mr. Justice Swayne's language, as applied to the eleven States alone, is in harmony with Reconstruction on the basis of conquest, and only on that.

But if *the rights of persons and of property* involved in the cases in which this is affirmed could have been decided on the merits in the same manner if the court had held that these States had been treated as Territories of the United States, the language of a judicial opinion is of very little value *as evidence* of the actual political fact, in comparison with the measures themselves which were enforced by "the political department." [1]

Besides, independently of the actual failure of the judicial department to settle this question, it results from the very nature of the judicial function, as limited to the determination of questions under the written Constitution as *law*,[2] that it is as open now as it ever was to each citi-

States during the insurrection is of no consequence to the argument," — in Keith *v.* Clark, *ante*, p. 33.

[1] Compare *ante*, p. 150.

[2] *Ante*, p. 5.

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zen of the United States, and as it must forever be to all foreign observers, to discuss the real question of *political* fact, that is, whether the prevailing belligerent, represented by the general Government, had accepted the existence of the eleven States as States of the United States, co-ordinate members of the Union, or, on the contrary, had accepted them only as geographical portions of the domain of the United States, and as being *States* only as land and inhabitants may be called such, apart from any possession of those political rights and powers which the States ordinarily exercise.

The political action which it is most important to notice as involving some determinative view of our national existence is that which is ordinarily termed the Reconstruction legislation of the thirty-ninth Congress at its second session, contained in the Act of March 2, 1867, entitled, "An Act for the more Efficient Government of the Rebel States," with the supplementary Acts, as they have been already in part described, *ante*, pp. 40, 41.

There were other measures of a legislative nature, including in this description legislation embodied in the form of constitutional amendment as well as ordinary statute law, adopted before or after this particular statute,[1] which

[1] Most of this legislation may be said to have grown out of the policy adopted by the executive department in reference to the slave population of the States of the Confederacy; as, particularly, "A Bill to establish a Bureau for the Relief of Freedmen and Refugees," passed March 3, 1865, 13 U. S. Stat. 507, and "An Act to protect all Persons in the United States in their Civil Rights and furnish the Means of their Vindication," passed April 9, 1866, 14 U. S. Stat. p. 27, commonly called the Civil Rights Bill. This bill might seem to have been passed by Congress in anticipation of powers to be derived from the Fourteenth Amendment, which, however, had not then even been proposed by Congress for adoption. Some of the supporters of the bill, however, appear to have based the statutory power on the clause in Art. iv., Sect. 2, of the Constitution: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." See Mr. Bingham's speech, Cong. Globe, 1st Sess. 39th Cong. p. 158; Wilson's History of the Reconstruction Measures, &c., p. 52.

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were calculated to affect permanently the ordinary powers and jurisdiction of the several States whose position at the close of the war was in question. These measures were considered by the persons then administering the government of the United States to be politically necessary in view of the future exercise by the States of the rebel Confederacy of the powers held, or to be held, by each and every State of the Union. In a sense, therefore, they might be considered part of the general system of Reconstruction, as applied to these States particularly. But, as they were not limited in their legislative effect to the States compromised by the Rebellion, but affected the separate powers and jurisdiction of every other State as well, they must be distinguished from measures confined in their effect solely to the determination of the political position of these particular States.

Among these measures were Articles xiii., xiv., and xv., of Amendments to the Constitution.[1] These amendments,

[1] On the supposition that the eleven States were properly included in the whole number of States, the consent of some of them was necessary to secure the requisite proportion of three fourths. Art. xiii., proposed Feb. 1, 1865, ratification declared Dec. 18, 1865, 13 U. S. Stat. 774, Virginia, Louisiana, Arkansas, South Carolina, Alabama, North Carolina, Georgia, and Tennessee being computed in the ratifying three fourths, at which date none of these States were represented in Congress, all, except Tennessee, being then under governments declared to have been illegal by the Reconstruction Act of March 2, 1867, and its supplements; *ante*, p. 40. Art. xiv., proposed June 16, 1866, ratification declared July 28, 1868, 15 U. S. Stat. 708. Among the States computed in the ratifying three fourths were those whose adoption of this article had been declared a condition of admission to representation by "An Act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to Representation in Congress," passed June 25, 1868, 15 U. S. Stat. 73. Arkansas was also counted as ratifying, whose admission to representation in Congress had been declared to be due to her antecedent ratification of this amendment, by "An Act to admit the State of Arkansas to Representation in Congress," passed June 22, 1868, 15 U. S. Stat. 72. Art. xv., proposed Feb. 27, 1869, ratification declared March 30, 1870, 16 U. S. Stat. 1131. Among the States computed in the ratifying three fourths were those whose ratification of this amendment had been declared a condition of admission to representation by Sect. 6

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being adopted, have equal effect as law throughout all the States and Territories of the United States. But some index of the political position of the States compromised by the Rebellion is given by the political action of the Government when calculating the total number of States of which the consent of three fourths was necessary for the adoption of any amendment, as well as by its accepting the determination of any of these States in estimating the required three fourths.

Already, some months before this second session of the Thirty-ninth Congress, a new Constitution for the State of Tennessee[1] had been adopted by the action of the political people of the State as the same had been con-

of "An Act authorizing the Submission of the Constitutions of Virginia, Mississippi, and Texas to a Vote of the People, and authorizing the Election of State Officers provided by said Constitutions, and Members of Congress," passed April 10, 1869, 16 U. S. Stat. 1131.

[1] In a resolution of Congress, Feb. 18, 1865, 13 U. S. Stat. p. 567, Tennessee was named as one of the States which, having "rebelled against the government of the United States, . . . were in such condition" that no valid election for electors of President could be had.

"The joint Resolution restoring Tennessee to her Relations to the Union," 14 U. S. Stat. p. 364, reads: "Whereas, in the year eighteen hundred and sixty-one, the government of the State of Tennessee was seized upon and taken possession of by persons in hostility to the United States, and the inhabitants of said State, in pursuance of an Act of Congress, were declared to be in a state of insurrection against the United States; and whereas said State government can only be restored to its former political relations in the Union by the consent of the law-making power of the United States; and whereas the people of said State did, on the twenty-second of February, eighteen hundred and sixty-five, by a large popular vote, adopt and ratify a Constitution of government whereby slavery was abolished, and all ordinances and laws of secession, and debts contracted under the same were declared void; and whereas, a State government has been organized under said Constitution which has ratified the amendment to the Constitution of the United States abolishing slavery, also the amendment proposed by the Thirty-ninth Congress, and has done other acts proclaiming and denoting loyalty: Therefore —

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Tennessee is hereby restored to her former proper, practical relations to the Union, and is again entitled to be represented by senators and representatives in Congress. Approved July 24, 1866."

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stituted under its previously existing laws, a new State government under that Constitution had been elected, and senators and representatives from the State had been received in Congress.

The admission of the State of Tennessee may be called one of the measures of Reconstruction. But it would be difficult to gather from the history of the State during the war and before this admission, or from the political facts recited in the resolution of Congress declaring its reconstruction, restoration, recognition, or whatever else it may be called, any political doctrine of general application.[1]

As the case of this State presented differences more or less essential, as compared with the general circumstances of the other States of the Confederacy, a further notice of its particular relations with the general Government may be here waived, in proceeding with the examination of the general inquiry.

This Act of March 2, 1867, as passed, is, in all essential parts, identical with the bill which, Feb. 15, 1867, was returned from the Senate, with amendments, to the House, having, in the first instance, passed the House on the 13th of the same month.

This bill had originally been reported in the House as from the Joint Committee on Reconstruction,[2] by Mr.

[1] See a summary account of this transaction in Wilson's History of Reconstruction, pp. 803–813.

[2] House Journal, 2d Sess. 39th Cong. p. 402; Cong. Globe, 2d Sess. 39th Cong. p. 1036. This committee had originally been appointed at the first session of this Congress, and as a joint committee its existence was limited to the duration of the session. "In the House, on the second day of the second session, Mr. Stevens introduced a concurrent resolution that the same committee should be reappointed. It was adopted without a division, and concurred in by the Senate on the following day." Wilson's History of the Reconstruction Measures of the 39th and 40th Congresses, p. 334. The majority-report from this committee, June 8, 1866 (*ante*, p. 42), is officially printed under the title, "Report of the Committee on Reconstruction." It does not appear therein how the committee had acquired this title. The heading of the report is, "The joint committee of the two Houses

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Stevens, the chairman, on Feb. 6, 1867, with the title "A Bill for the more Efficient Government of the Insurrectionary States."

As originally reported from the committee, and as it had passed the House before going to the Senate, the provisions of this bill related only to the establishment of military governments in the ten States mentioned in the bill, and were substantially those embodied in the first four sections of the bill as finally passed. It contained no provisions similar to those in the fifth section of the bill, as amended in the Senate, and as finally enacted.

This section, which is the only part of the statute to which the word *Reconstruction* can be applied as a descriptive term, indicates a totally different political intention from that manifested in the first four sections, even though there may be no necessary incompatibility between the two parts of the Act, as based on different conceptions of the existence of these States.

This will explain the circumstance that the members of the House and of the Senate who voted for the Act as finally passed were distinguishable as those who, while they favored the original bill, opposed the amendment, and those who, while they favored the amendment, opposed the original bill.[1]

Independently of any inferences from the several provisions of the Act itself as finally passed, some indication of the political ideas of Congress may be gathered from the history of its passage through the Senate and House.

of Congress, appointed under the concurrent resolution of Dec. 13, 1865, with direction 'to inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress, with leave to report by bill or otherwise,' ask leave to report."

[1] This division of opinion among those who finally voted to pass the entire statute, being two thirds of each House, was entirely independent of the then existing party distinctions, and, for the same reason, the speakers among the minority opposing the entire statute rested their objections to the original bill and to the amendment on distinctly different grounds.

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The report made by the majority of the same committee at the previous session, June 8, 1866, has already been cited (*ante*, p. 48) as a document which might be expected to contain some declarations which should be received as an opinion, of greater or less authority, as to the position or relations of a State of the Confederacy towards the United States, as represented by the general Government.

By the renewal of the committee at this second session of the same Congress, this report stands in the same connection with the bill offered at this session by Mr. Stevens as it had with any of "the specific recommendations submitted" at the first session by the majority, at the same time with their report. (*Ante*, p. 48.)[1]

Here, therefore, it is again referred to as it may be historically connected, in the relation of apparent motive to recorded action, with the measures enforced under the legislation of Congress at this crisis; and it is in that connection that the opinions of those who signed this report are noticeable in following the line of inquiry already indicated.[2]

[1] These are found on the introductory pages (iv., v.) of the report, in a proposed amendment which afterwards became the Fourteenth Article of Amendments (*ante*, p. 217, note), and two proposed bills, one entitled "A Bill to provide for restoring to the States lately in Insurrection their full Political Rights." This appears to have been that which was reported to the House April 30, 1866, as House Bill, No. 543. It provided that, "whenever the above-recited amendment shall have become part of the Constitution of the United States, and any State lately in insurrection shall have ratified the same, and shall have modified its Constitution and laws in conformity therewith, the senators and representatives from such State, if found duly qualified, may, after having taken the required oaths of office, be admitted into Congress as such." This appears to have been the bill which, according to Mr. Blaine's statement in the House Feb. 12, 1867, "was kicked under the table in both branches. It was so far scouted that it never had a third reading." Cong. Globe, 2d Sess. 39th Cong. p. 1182.

[2] "The government of free countries is largely in the hands of committees." North Am. Rev., December, 1879, in an article by Mr. George S Boutwell, one of the committee who signed this report.

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Theories apparent in the Report.

A passage from the report itself has already been cited, *ante*, p. 48, in which the signers themselves speak of "the specific recommendations submitted by them" as "the result of mutual concession, after long and careful comparison of conflicting opinions." I think it is also apparent, from a comparison of the several paragraphs which I have cited from the report, and indicated by letters in brackets on pages 43 to 46, and of those numbered from one to five on pages 46, 47, that two different theories can be distinguished as having been entertained by the committee and as having been put forth in almost regular alternation in the majority report, one of these being the *conquest* theory, the other, some theory which, for convenience, may be called the doctrine of *State-suicide*.[1]

A passage occurs in a portion of the report which has already been cited, *ante*, p. 44, which might seem to indicate that the action of Congress was invoked upon the basis of executing the guaranty to each State of a republican government.

The passage reads: —

"A State within the Union has obligations to discharge as a member of the Union. It must submit to Federal laws and uphold Federal authority. It must have a government republican in form, and by which it is connected with the general government, and through which it can discharge its obligations."

It may be thought that this language would be inconsistent with the assertion either of a conquest of these States, or of the doctrine of their lapse into a Territorial condition, there being, under either view, no "State in the Union" to receive the benefit of the guaranty.

This passage in the report must, however, be understood in connection with the whole paragraph in which it stands, which is a reply to the objection that the Confederate

[1] Compare also the clauses marked [*a*] and [*b*] in the rejected preamble of the bill described, *ante*, p. 37, and note 2.

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States were still States of the Union, and which grants the "question" as a "profitless abstraction," while, in the paragraph immediately following, an answer is given, concluding that "the States may, through the act of their people, cease to exist in an organized form." [1]

All that I have occasion to notice in this connection is the political fact that, judging only from the report itself, the members of the majority of the committee were divided as those who relied on the theory of conquest and those who relied on some theory of State-lapse as a basis for reconstruction, and that, therefore, the action of Congress, if regarded as adopted in consequence of this report, may be understood as intended to carry out one or the other of these ideas.

In addition to the internal evidence presented by the report itself, other evidence of the political views of its framers may be gathered from the criticism of the minority report made at the same time, which is mainly based upon the objection that the report rendered by the majority involves the assertion that the eleven States had been conquered *as States*. Against this they cite from the opinions of the courts and declarations of the government repudiating the idea of such a conquest, and especially from the opinions of Judge Sprague in the Amy Warwick,[2] and of Judge Nelson in *Re* Egan.[3]

The individual opinions of the several members of the majority of the committee may be more or less known from their share in the debates on this bill, or from their declarations made on other occasions.

The members of the committee who signed the majority report were, Senators W. P. Fessenden of Maine, James W. Grimes of Iowa, Ira Harris of New York, J. M. Howard of Michigan, George H. Williams of Oregon, and Representatives Thaddeus Stevens of Pennsylvania, Elihu B.

[1] *Ante*, p. 43 [d]; p. 45 [e]. [2] To be cited hereafter. [3] *Ante*, p. 44, *n*.

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Washburne of Illinois, Justin A. Morrill of Vermont, John A. Bingham of Ohio, Roscoe Conkling of New York, George S. Boutwell of Massachusetts.[1]

As the bill introduced in the House by Mr. Stevens on the 6th was nearly the same as one introduced on the 4th of February, 1867, in the Senate by Mr. Williams,[2] another member of the committee, it may be supposed that this senator agreed in the views taken by Mr. Stevens as to the position of the States of the Confederacy, as being conquered States.

On the 15th of February Mr. Howard, who was also a member of the joint committee, said in the Senate, in the debate on amending the House bill, —

"The principle upon which the bill proceeds is the principle for which I have all along contended, that the rebel States, as communities, have been conquered by the arms of the United States in the prosecution of the war which resulted in the suppression of the rebellion waged by those States. I hold that, subject to the Constitution of the United States, and to the duty of ultimately restoring the rebel States to their former standing under the Constitution, the government of the United States has the same power in reference to those conquered communities as it would have had they been foreign territory." Cong. Globe, 2d Sess. 39th Cong., p. 1365; Wilson's Hist. Rec. p. 353.

[1] Those of the same committee who signed the minority report were Senator Reverdy Johnson of Maryland, Representatives Henry Grider of Kentucky, and Andrew J. Rogers of New Jersey. Henry T. Blow, of Missouri, Representative, a member of the committee, had not signed either report, and was excused from attendance during the second session on account of illness. Mr. Grider had died before the session, and his place had been filled by Mr. Hise, also a representative from Kentucky.

[2] Senate bill No. 564, read twice by its title and referred to the Joint Committee on Reconstruction and ordered to be printed. Cong. Globe, 2d Sess. 39th Cong. p. 975. Mr. Wilson, History of the Reconstruction Measures, &c., p. 335, says that the two bills were nearly alike. The Senate bill had the word *Rebel*, for *Insurrectionary*, in the title, and also gave the President the power of appointing the military commanders, which in the House bill was given to "the general of the army." These features were placed in the House bill after it had gone to the Senate.

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In the Senate, Feb. 3, 1866, in remarks "upon the condition of the country in view of the veto on the Freedman's Bureau, and upon reconstruction," during debate on resolutions from the House against the admission of senators and representatives from the eleven States, Mr. Fessenden, who was also a member of the Committee on Reconstruction, had maintained the doctrine of conquest as in an international war.[1]

The debates in the House on this bill began on the 7th of February, 1867, being opened in a speech by Mr. Stevens. The bill was read a first and second time, and the question was on ordering it to be engrossed and read a third time. Cong. Globe, pp. 1036, 1037, with bill in full.

Mr. Stevens said: —

"This is a bill for the purpose of putting under governments ten States now without governments. They are States of the late so-called Confederacy, as I have called them. Other gentlemen have contended that they were States nowhere. I have differed with these gentlemen in this respect. I have said that these were perfect States, with perfect organizations, under a foreign government. It is, at any rate, certain that those States now have no governments

[1] "He maintained 'that this country has been in a state of war, decidedly in a state of war, war according to the books, war in its worst acceptation, war in the very strongest meaning of the term, or without any limit or qualification. If we have been in a state of war, the question arises, and it is a very simple one, and I think the whole thing lies in a narrow compass, Is there any dispute as to what are the consequences of war? What are the consequences of successful war? Where one nation conquers another, overcomes it without qualifications, without terms, without limits, and after a bitter contest succeeds in crushing its enemy, occupying its enemy's territory, destroying its ports, what are the consequences? . . . Is there anything more certain than that the conqueror has a right, if he chooses, to change the form of government, that he has a right to punish, that he has a right to take entire control of the nation and the people, that he has a right to exact security for the future, and such security for his own safety as he may demand; that all these rights are his, with only the limitation that he shall not abuse them and conduct them in a manner contrary to humanity, in the ordinary acceptation of the term?'" Wilson's Hist. Rec. p. 208; Cong. Globe, 1st Sess. 39th Cong. p. 987.

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which are known to the Constitution and laws of the United States of America; that for nearly two years they have been lying in a disorganized condition. Nearly two years ago the army of a government, calling itself the Confederate States of America, was conquered, and the government was dispersed. By the law of nations the conqueror, after that, had a right to say exactly what government should be administered over them or by them, keeping always within the law of nations. The conqueror had a right either to extend his own laws over those conquered States, or, if no action was taken by the conqueror, then, by the law of nations, the old institutions were permitted to run on for the purpose of administering the local laws until such time as the conquering party should act. I have merely stated the condition of those States according to the well-known law of nations." Cong. Globe, 2d Sess. 39th Cong. p. 1076.[1]

In his remarks on February 7, above cited, Mr. Stevens referred apparently to some other members of the committee, as the "other gentlemen who have contended that they were States nowhere." This may be supposed to mean that others of the committee from which the bill came were distinguishable as having sustained, or proposed to sustain, a course of political action based on the assumption that these States had ceased to exist as States or as political members of the Union, and were to be regarded as being substantially territories of the United States; or

[1] Mr. Stevens, as chairman, had at the previous session reported the bill from the same committee (*ante*, p. 221), which recognized the existence of those States. Mr. Stevens had, however, Jan. 8, 1867, introduced a substitute for that bill, with a preamble: "Whereas, The eleven States which lately formed the government called the Confederate States of America have forfeited all their rights under the Constitution." Cong. Globe, 2d Sess. 39th Cong. 250. From much of the argument of Mr. Stevens and others in supporting House Bill No. 1143, it might be inferred that they did not rest the power claimed so much on the issue of the war in 1865 as on the refractory temper of the white population of these States after that time, as shown by their unwillingness to ratify the Fourteenth Amendment (see Senator Doolittle's remarks, Feb. 16, 1867, Cong. Globe, p. 1440), and by their treatment of those emancipated under the Thirteenth Amendment confirming the liberation supposed to have been effected by Mr. Lincoln's proclamation.

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to employ the phrase of that time, these gentlemen had accepted some theory of *State-suicide*.[1]

In the debates in the House, Mr. Boutwell[2] supported Mr. Stevens's bill as originally introduced[3] and agreed with him also in resisting, as inconsistent with the powers to be exercised under its provisions, the amendments then proposed, which were incorporated into the fifth section of the Act as finally passed.

Mr. Boutwell did not in this debate express a direct dissent from Mr. Stevens's doctrine of conquest, though he intimated on several occasions his non-recognition of the States as *States*. He had on previous occasions fully maintained a doctrine of State-suicide, as in the resolutions offered by him Feb. 16, 1864, Cong. Globe, 1st Sess. 38th Cong. p. 683; Macpherson's Pol. Hist. p. 328; in remarks in a debate in the House, May 4, 1864, Cong.

[1] In remarks, Dec. 18, 1865, on offering resolutions on the President's message, Mr. Stevens said, "The President assumes what no one doubts, that the late rebel States have lost their constitutional relations to the Union, and are incapable of representation in Congress, except by permission of the Government. It matters little, with this admission, whether you call them States out of the Union, and now conquered territories, or assert that because the Constitution forbids them to do what they did do, that they are, therefore, only dead as to all national and political action, and will remain so until the Government shall breathe into them the breath of life anew, and permit them to occupy their former position. In other words, that they are not out of the Union, but only dead carcasses lying within the Union." Mr. Stevens proceeded to place the power of Congress on the clauses, "new States may be admitted by the Congress into this Union," and the guaranty of republican government to each State. After which he proceeded to demonstrate the conquest doctrine, relying on the decision of the Supreme Court, especially citing Grier, J., in the Prize cases, and Mrs. Alexander's cotton. (*Ante*, pp. 49, 64.) Cong. Globe, 1st Sess. 39th Cong. p. 72; Wilson's Hist. Rec. p. 43.

[2] Afterwards Secretary of the Treasury.

[3] Feb. 8, 1867, Mr. Boutwell said of Mr. Stevens's bill, "I believe I am guilty of no breach of confidence when I say that never has any report been made from that committee which was so unanimously supported by its different members as the one now under consideration by the House; nor has any bill submitted by that committee ever been so carefully considered as this." Cong. Globe, 39th Cong. p. 1122.

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Globe, 1st Sess. 38th Cong. p. 2103; also in an address delivered at Weymouth, Mass., July 4, 1865, published in pamphlet entitled "Reconstruction and its True Basis."

For reasons already given, the debate on Mr. Stevens's original bill is to be distinguished from that on the provisions for "reconstruction," first proposed during the same debate in the House, and afterwards incorporated in the bill by the Senate.

At the evening session of the day of the introduction of the bill, Mr. Bingham, who was also a member of the committee, and who had signed the majority report, asked leave to introduce several amendments; the first being to strike out the preamble,[1] because, as he said, "it is interpreted by the gentlemen who reported this bill as being intended, although it is no part of the bill and has no operative effect, — as a solemn declaration on the part of this House that those States are foreign conquered territories, and that the people of those States, and all the people therein, are alien enemies, captives of war, and subject to the conqueror's will." Cong. Globe, 2d Sess. 39th Cong. p. 1081.

On the same day, February 7, Mr. Bingham proposed certain amendments to the bill in respect to regulating the

[1] The preamble of Mr. Stevens's bill read, "Whereas, the pretended State governments of the late so-called Confederate States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Texas, and Arkansas, were set up without the authority of Congress, and without the sanction of the people; and whereas said pretended governments afford no adequate protection for life or property, but countenance and encourage lawlessness and crime, and whereas it is necessary that peace and good order should be enforced in said so-called States until loyal and republican State governments can be legally established, Therefore, be it," &c. "That said so-called States shall be divided," &c.

Mr. Bingham proposed a substitute, reading, "Whereas, it is necessary that peace and good order should be enforced in the several States of Virginia, &c., lately in rebellion, until said States respectively shall be fully restored to their constitutional relations to the United States."

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issue of writs of *habeas corpus*,[1] and on the 12th brought forward the proposition for an amendment which he had, in the committee, endeavored without success to have incorporated with the bill as reported by Mr. Stevens,[2] and which consisted in provisions for reconstruction like those afterwards embodied in Sect. 5 of the Act as passed.

After Mr. Bingham had proposed his amendment of the 12th, Mr. Blaine, of Maine, on the same day, "said he would vote for the bill whether amended or not," but proposed as an amendment a section which he urged Mr. Stevens to accept as additional to his own bill, and which contained similar propositions to those in Mr. Bingham's amendment.[3]

[1] Cong. Globe, p. 1084. These related to the issue of the writ from courts of the United States in behalf of persons in military custody, and were not finally embodied in the Act. Mr. Bingham's remarks at this time had, however, a general application to the propriety of the whole bill, and were, seemingly, a preparation for the more important amendment of the 12th, which, as first proposed, was a virtual remodelling of the whole enactment by putting the *reconstruction* provisions in a first section, as the main object of the bill, and making the original provisions for military governments appear secondary to the *reconstruction* clauses. In that form it is found in the Cong. Globe, p. 1177.

[2] According to his own statement, February 13. Cong. Globe, p. 1212; Wilson's Hist. Rec. p. 345.

[3] In Mr. Bingham's amendment it was provided that whenever the articles recited in this proposed bill (the Fourteenth of Amendments) "shall have become part of the Constitution of the United States, and any State aforesaid, lately in insurrection, shall have ratified the same," &c. This seems to be worded so that these States might be counted in the whole number, if with their assents the requisite three fourths could be obtained, or excluded from the whole number if they withheld their consent. The same elasticity seems to have been sought in the language of the fifth section as finally adopted. See *ante*, p. 41. Mr. Blaine's amendment presented this important feature, as he stated it himself in the House, February 12: "It specifically declares that three fourths of the States now represented in Congress have the power to adopt the constitutional amendment and does not, even by implication, give them to understand that their assent or ratification is necessary to its becoming a part of the Constitution." Cong. Globe, 2d Sess. 39th Cong. p. 1182. His proposed amendment to the bill read, "That when

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On the 13th, Mr. Bingham accepted Mr. Blaine's amendment as his own.

But their combined efforts to have the amendment incorporated into the bill before the House were unsuccessful.

The introduction of these amendments into his own bill was vehemently resisted, at each step in its passage, by Mr. Stevens, who refused even to give an opportunity to take the sense of the House upon it. He, as did also Mr. Boutwell,[1] opposed them as being entirely inconsistent with the power to be exercised under his bill, and a virtual recognition of the propriety of President Johnson's general action in reference to these States.

On the 13th, Mr. Stevens introduced a "substitute" for his original bill, differing only by a slight modification of its phraseology "to make the bill more acceptable."

On the same day this bill was put to vote, and passed the House. Yeas, 109; nays, 55; not voting, 26. Cong. Globe, 2d Sess. 39th Cong. p. 1215.

It is of course by no means certain that any action of the House of Representatives was in accord with the views of the majority of the Committee on Reconstruction,[2]

the constitutional amendment, proposed as Art. XIV., by the Thirty-Ninth Congress, shall have become a part of the Constitution of the United States by the ratification of three fourths of the States now represented in Congress, and when any one of the late so-called Confederate States shall have given its assent to the same, and conformed its constitution and laws thereto in all respects." Mr. Blaine did not at this opportunity offer any argument for excluding States which had been counted in ratifying the Thirteenth Article. *Ante*, p. 217, note.

[1] Cong. Globe, p. 1209.

[2] Mr. Thayer, one of the members of the House who supported Mr. Stevens's bill said, February 8, "Nobody, I suppose, regards this bill as a Reconstruction Bill." Mr. Stevens, February 13, said, "I may say that this bill came from the same committee after a careful examination, with the unanimous consent of every member of the committee belonging to this side of the House, except one. It came here with a perfect understanding that, if it was to pass and become a law, it must pass without amendment. It was not intended as a Reconstruction Bill. It was intended simply as a

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merely because following their report in the order of time, and much less certain that it was intended to express political views identified with the opinions of any individual member of that committee. Still, from the history of this bill of Mr. Stevens, as passed by the House on Feb. 13, 1867, without amendment, it is a natural inference that the majority of the House had accepted either the doctrine of conquest or that of State-suicide.

On the other hand, I do not know of any public document connected with the action of the Government in reconstruction, as was this report with the bill so passed in the House, which can be referred to as showing that that action was based by Congress upon the theory of a power and duty arising from the guaranty by the United States, to each State, of a republican government.[1]

On the 15th, Mr. Johnson, of Maryland,[2] though not proposing to vote for the bill, moved in the Senate to amend the House bill by adding a section containing the Reconstruction amendment of Messrs. Bingham and Blaine. On the 16th, Mr. Sherman, of Ohio,[3] moved a substitute for the House bill, which consisted of the bill originally reported in the Senate by Mr. Williams,[4] February 4, and

police bill to protect loyal men from anarchy and murder." Cong. Globe, p. 1214. As this part of the Act seems to have been the only legislation proposed from the committee which attained the force of statute law, it might be questioned whether the name *Committee on Reconstruction* which it had acquired, did not prove somewhat of a misnomer; unless the provision suggested by the "one" member goes to its credit, though the committee had refused to give it their recommendation.

[1] Among a variety of bills introduced by their titles were two bills, each entitled, "A Bill to Guarantee a Republican Government," &c., introduced into the House at the second session of the Thirty-ninth Congress (Cong. Globe, pp. 44, 819), but no further proceedings were had.

[2] Mr. Reverdy Johnson, who has been of the committee on Reconstruction, and one of the signers of the minority report.

[3] Afterwards Secretary of the Treasury.

[4] *Ante*, p. 224, note. Senator Sherman, in moving his substitute, said, "The first four sections of this substitute contain nothing but what is in the present law. There is not a single thing in the first four sections that does

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which Mr. Stevens had reported with modifications in the House on the 6th, with the addition of Mr. Bingham's original amendment. Wilson's Hist. of Reconstruction, p. 364.

In this form the bill passed the Senate, February 16. Yeas, 29; nays, 10. Cong. Globe, pp. 1360, 1379, 1459.

Being returned to the House in this form, the House refused to concur. Yeas, 73; nays, 98; not voting, 19. Cong. Globe, p. 1340.

February 20, the Senate insisted on their amendment.

The bill being again before the House, an amendment, proposed by Mr. Wilson of Iowa, as to non-eligibility, for conventions for framing the new constitutions, of persons excluded from holding office under the United States by the proposed constitutional amendment was adopted, and also another, moved by Mr. Shellabarger, of Ohio, that the same disqualification should rule in framing any provisional government. In this form the Senate bill passed the House, Feb. 20, 1867. Yeas, 126; nays, 46; not voting, 18. Cong. Globe, p. 1401.

The bill again passed in the Senate, and afterwards became a law by a two-thirds vote of both Houses, after having been returned unsigned by President Johnson.[1]

Considering the want of harmony in the ordinary statements of the political character of the event made by official representatives of the Government, of which a very imperfect illustration has been given by the citations in former chapters, it is probable that there will always be much difference of opinion as to the character of the action of Congress bearing on the status of these States, and consequently, for some time to come, a difference of

not now exist by law. . . . In regard to the fifth section, which is the main and material feature of the bill." Wilson's Hist. Rec., p. 365.

[1] The most important clauses of Sects. 5 and 6 have already been given, 40, 41.

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opinion as to what should be the position of any State, under like circumstances, in the future.

The conflict of political doctrine, co-existing with unity in political action, which stands recorded in the history of this enactment, suggests a practical comment, which I introduce by citing the criticism of Macaulay on a document, famous in English history, to which, I think, this legislation offers something like a parallel instance.

The historian is relating the crisis which occurred on the 28th of January, 1688, when the English House of Commons, in committee of the whole, found itself compelled to decide, by some course of action, whether it would or would not recognize James the Second as the king of England, and its decision was expressed by the resolution declaring the throne vacant.

Of this resolution, Macaulay says, in the tenth chapter of his History of England: —

"The minority sullenly submitted, and suffered the predominant party to take its own course.

"What that course would be was not perfectly clear. For the majority was made up of two classes. One class consisted of eager and vehement Whigs who, if they had been able to take their own course, would have given to the proceedings of the Convention a decidedly revolutionary character. The other class admitted that a revolution was necessary, but regarded it as a necessary evil, and were desirous to disguise it, as much as possible, under the show of legitimacy. The former class wished for a distinct recognition of the right of subjects to dethrone bad princes. The latter class wished to rid the country of one bad prince without promulgating any doctrine which might be abused for the purpose of weakening the just and salutary authority of future monarchs. The former class dwelt chiefly on the king's misgovernment; the latter on his flight. The former class considered him as having forfeited his crown; the latter as having resigned it.

"It was not easy to draw up any form of words which would please all whose assent it was important to obtain; but at length,

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out of many suggestions offered from different quarters, a resolution was framed which gave general satisfaction. It was moved that King James the Second, having endeavored to subvert the constitution of the kingdom by breaking the original contract between king and people, and, by the advice of Jesuits and other wicked persons, having violated the fundamental laws, and having withdrawn himself out of the kingdom, had abdicated the government, and that the throne had thereby become vacant.

"This resolution has been many times subjected to criticism as minute and severe as was ever applied to any sentence written by man; and perhaps there never was a sentence written by man which would bear such criticism less. . . . It is idle, however, to examine these memorable words as we should examine a chapter of Aristotle or of Hobbes. Such words are to be considered, not as words, but as deeds. If they effect that which they are intended to effect, they are rational, though they may be contradictory. If they fail of attaining their end, they are absurd, though they carry demonstration with them. Logic admits of no compromise. The essence of politics is compromise. It is therefore not strange that some of the most important and most useful political instruments in the world should be among the most illogical compositions that ever were penned. The object of Somers, of Maynard, and of the other eminent men who shaped this celebrated motion was, not to leave to posterity a model of definition and partition, but to make the restoration of a tyrant impossible, and to place on the throne a sovereign under whom law and liberty might be secure. This object they attained by using language which, in a philosophical treatise, would justly be reprehended as inexact and confused. They cared little whether their major agreed with their conclusion if the major secured two hundred votes, and the conclusion two hundred more. In fact the one beauty of the resolution is its inconsistency. There was a phrase for every subdivision of the majority. . . . To the real statesman the single important clause was that which declared the throne vacant; and if that clause could be carried, he cared little by what preamble it might be introduced. The force which was thus united made resistance hopeless. The motion was adopted by the committee without a division."

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The Practical Comment.

The comment which this citation from Macaulay was intended to introduce is that, whatever opinions may have influenced the action of Congress in the so-called reconstruction legislation, the ten States were placed in their "practical relations" to the Government of the United States by political measures which were essentially the same as those which occur in the admission of new States, created in former Territories. States were *reconstructed* out of the materials of land and population, and therefore they were not *restored*. The very name *reconstruction*, which has been popularly adopted to express the transaction,[1] expresses its real nature, in spite of the disguises which had been invented to conceal it, and which seemed to be necessary because no theory of our national existence had been given, adequate to receive the new political fact as agreeing with the original political facts from which the written Constitution derived its authority as law.

From the general tenor of these reconstruction provisions, thus added to Mr. Stevens's original bill for military governments, it might be surmised that, if Congress, as a whole, can be supposed to have entertained any definite theory (neither that of conquest, nor that of State-lapse) as supporting this legislation, it was one founded on the clause in the fourth article, commonly called the guaranty clause.

It may further be assumed, for the present at least, on the testimony given on this point in the opinions of jus-

[1] It may, perhaps, hereafter be taken not to apply merely to the rehabilitation of the eleven States of the Confederacy, but to an entire change in the relations of all the States or a general *reorganization* of our political life. This appears to have been the sense in which it was first employed in our politics: as in some of the resolutions offered in the Senate in 1861 (see Macpherson's Pol. Hist. 64, 65), and in various public declarations made soon after, in the name of the Southern States. Ib. 329, 331.

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tices of the Supreme Court which have herein been cited,[1] that, in undertaking to fulfil a duty or use a power under this clause, Congress presupposed that, as a political fact, these States, being States of the Union, were at this time destitute of republican governments, either, —

1, Because they had no State governments at all; or,

2, Because, having State governments, they were governments which were not republican in form.

This being understood as the general doctrine relied on by Congress, it may properly be inquired —

Upon what reasoning may either of these positions be sustained?

The question is not, On what reasoning did the several members of Congress who held either of these positions rest their convictions? It cannot be assumed that their reasoning was the best possible reasoning to support those convictions. It cannot be inferred that the arguments offered before Congress as a legislative body were those which influenced its action; or that they were held by it, or should be held by any body, the best of all possible arguments for that action, even though they may have been presented by the persons who had originally proposed such action.

For this reason, I would not present the remarks of any particular member of the House or of the Senate, as those on which the whole argument from the guaranty clause should be judged. As, however, Mr. Bingham was the mover of the *reconstruction* provisions, and as his argument may be supposed to have been that against which most opponents of that part of the statute directed their replies, it may be taken as presumptively representing the prevailing ideas of the majority in regard to the guaranty clause, and its applicability in this instance.

[1] Texas *v.* White, *ante*, p. 14; Keith *v.* Clark, *ante*, p. 80.

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Mr. Bingham's Argument.

On Feb. 7, 1867, when offering his first amendment to Mr. Stevens's bill, Mr. Bingham said:[1] —

"It is true, undoubtedly true, that these States remained disorganized States in the Union. It is also undoubtedly true that those who were the conquerors upon the field of battle reduced those in rebellion to subjection.[2] It is also undoubtedly true that the government of the United States, by its own election, extended to those insurgents the rights of belligerents,[3] and it is also true that by their rebellion those insurgents failed to place themselves in a position to put those States out of the Union or in the condition of foreign territories, or beyond the jurisdiction of the United States. They fully succeeded by their rebellion in overturning their previously existing State governments; and, that being the case, the gentleman will find an answer to his question in this, — that it follows from the premises[4] that the legislative power of the government of the United States is exclusive within those States, and will so continue, until the people thereof reorganize constitutional State governments, and the same shall be recognized by Congress. . . . I was proceeding to say, those insurgent States,[5] having by rebellion

[1] Cong. Globe, 2d Sess. 39th Cong. 1082. This portion of his remarks was mainly in reply to an inquiry by Mr. Eldridge of Wisconsin, as to his reconciling a military government with the position that these were "States of the Union, and not conquered territories."

[2] This is the important sentence, by the method of argumentation adopted by the speaker. In the ambiguity of the words here employed those "premises" are found on which his demonstration rests. Everything depends on identifying the personalities recognized in "the conquerors," and in those who were "in rebellion" and subjected.

[3] "By its own election," — because it could not do otherwise than accord belligerency to *somebody* whom it was impossible to treat in any other way than as a belligerent, *ante*, p. 199. This mention of "insurgents," as distinguished from "States," is to be noticed in connection with the mention, which follows, of "insurgent States" in this same argument.

[4] The speaker had not laid down any *premises* at all, from which any conclusion whatever could follow. He had simply asserted that the conqueror had put down a *rebellion* by overcoming those who were *insurgents* as to him. But this was equivalent to saying that his legislative power had always been exclusive; and this made the argument a *petitio principii*.

[5] The insurgents, then, who had just been spoken of as having been *conquered*, were, it seems, *States*. If States, they must previously have had some jurisdiction of their own, co-existent with that of the general government. But if the jurisdiction of the latter had now become exclusive, the

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destroyed and disorganized their State governments, ceased to be represented, or to be entitled to be represented, from that day in the Congress of the United States.[1] . . .

"The whole nation has settled[2] the question of the powers of Congress to legislate over those insurgent States, without their consent and against their consent. It must be so, or it follows that all the laws you have enacted during the last five years, affecting those people, are unconstitutional and void.[3] This exclusive power being in Congress to legislate over the people of those disorganized States for the protection of persons and property, it follows that their temporary organizations are subject to such limitations and prohibitions as, by law, Congress may impose. This being so, this bill in its general provisions touching those State governments is justified if, in the judgment of Congress, the

government must have conquered those States, — which was Mr. Stevens's proposition.

[1] If this statement was true it must have been true either as matter of law or as matter of fact. But the case was not like that of a corporation created by municipal law, which may be destroyed, as matter of law, by the illegal acts of the corporators. A State *government* could exist only by the will of the political people of a State, *being one of the United States*. The idea that the States held their powers under the Constitution of the United States as law, grows out of the fundamental falsity of the school of Story and Webster (*ante*, p. 118), which underlies all arguments like this of Mr. Bingham. So far as that Constitution was *law* for anybody, it was so because it expressed the will of the *States*, being united; as is proved by history. (*Ante*, ch. iv.) As to the matter of fact, each of these State governments had been and was at that moment sustained by the political people of one of these States, and therefore they were not, as matter of fact, overturned by those States.

[2] This was in reply to a question by Mr. Wright, of New Jersey, "I would like to ask the gentleman if, in his opinion, the party to which he belongs has conformed to the Constitution?" The reply indicates the entrance of an entirely new element in all the questions before Congress, then and afterwards; that is, that some new manifestation of the will of the sovereign, transcending the written constitution, had intervened; that a national will then demanded recognition above that written law which had been supposed to have been vindicated: in other words, that something revolutionary had occurred.

[3] This might very well be disputed by those who had based those laws on a "war-power" derived from the "law of nations." (*Ante*, p. 174.) Besides, this is reversing the logical and legal order. The validity of the legislation depends on the political facts. Here, the argument makes the political facts depend on the validity of the legislation.

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necessity for it exists. The power asserted by this bill is in perfect harmony with all the legislation of this government since the breaking out of the rebellion over those States.[1] It has been settled by the voice of the nation, as I before stated, that those States were subject, under the limitations of the Constitution, to such legislation as Congress may see fit to impose, and can exercise the functions of local self-government only by the sufferance of the nation." [2]

At this point in his remarks, the speaker was interrupted by another member of the Reconstruction Committee, whose view of the position of these States has already been noticed.[3]

"Mr. BOUTWELL. — Will the gentleman allow me to make an inquiry?

"Mr. BINGHAM. — Yes, sir.

"Mr. BOUTWELL. — I understand that the gentleman from Ohio desires, by his amendment to the preamble, to declare that these 'States,' as they once were in the judgment of all, are now States. If he believes that they are now States, I ask him how he can reconcile it with his oath to support the Constitution, if he does not accord to them all the rights of States under the Constitution,

[1] All that legislation had been founded on the theory of an international war, on which Mr. Stevens relied, and with which Mr. Bingham's amendments were in harmony, if he accepted the conquest doctrine.

[2] So far as there was a nation, it was that in which the United States, *i. e.*, the *States* united, held the sovereign power, and which, when it makes its will known for national purposes, makes it known through the persons sent by those States to act as their agents for national purposes, who were at that moment before the eyes of the speaker, — he being one among many in council to declare that will. None of these agents had any right to speak for the sovereign in any other way. But the pretension to do this was then, and has since been common enough in and out of Congress. Mr. Blaine, on moving his amendment to this bill (Feb. 12, 1867, *ante*, p. 229, Cong. Globe, 2d Sess. 39th Cong. p. 1182), stated his belief that "the true interpretation of the elections of 1866 was that, in addition to the proposed constitutional amendment, universal or at least impartial suffrage should be the basis of restoration. Why not declare it so?" he asked. On which a little dispute with Mr. H. J. Raymond, of New York, arose as to the inference to be drawn from those elections as to a measure which, in reality, involved the determination of the ultimate investiture of political sovereignty.

[3] *Ante*, p. 227.

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and to their citizens all the rights of citizens of the United States to the same extent as those rights are accorded to the people of his own State?

"Mr. BINGHAM. — I do not, by the amendment, say that they are now States as they once were. I have said they are States disorganized."

Mr. Bingham said further, in continuation of his reply to Mr. Eldridge's inquiry: —

"I have before replied to the gentleman that those States, having entered into rebellion, the unlimited power for the common defence throughout their limits was exercisable by Congress, by virtue of the very terms and intendment of the Constitution, and this power may be exercised by Congress until the time when those people return to their loyalty and fealty in such a manner as shall satisfy the people of the United States, duly organized and represented in Congress,[1] of their fitness to be restored to their full constitutional relations.

"If this is not law,[2] then it results that the moment you break the battalion of armed rebellion on the field of open conflict, that moment all the sovereignty that originally pertained to organized constitutional State governments[3] immediately sprung into being

[1] There are no "terms" in the Constitution, as a written law, to settle anything about this matter. An "intendment" must be predicated of some actual person, who, in this instance, could be no other than the States which then were the United States. The speaker's argument rested on the contradiction that some of these very States — from which, if they were States, the written Constitution derived its authority — could be excluded from representation by that Constitution as law. If the due organization and representation in Congress of the people of the United States are not, as matter of political fact, a consequence of their pre-existence as States united, there is no such thing as a people of the United States. Underlying all arguments such as the above is the idea of the people by hypothesis, the hypothetical nation, as generated in the school of Story and Webster. (*Ante*, p. 114.)

[2] It is *not* law, because there is no *law* to determine the question. If it were question of law, the strength of the argument would have been with those who resisted all this legislation. Because, even if the Constitution had been law acting on the States as its subjects, which it was not, there was nothing in the written Constitution denying the right of a State of the United States to be represented in Congress for any reason.

[3] Whatever sovereignty there was had pertained to the political people

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without the power of challenge on the part of the nation. I deny that such is the fact.[1] It remains for those who have been in rebellion, after they have surrendered upon the field of conflict, to exercise their right of petition, being citizens of the United States, peaceably and quietly under the general operation of the Constitution, the general jurisdiction of which still extends over them, and to present to the Congress of the United States a constitutional form of government, republican, as required by the Constitution,[2] and in all respects conformable to the laws of the United States, and thereby give some evidence of their disposition and fitness to return to that allegiance which they attempted to throw off by their treason and which they always owe to that government, and to be restored to the powers of organized States of the Union which had protected them and theirs.[3] When that day comes the government by the sword ought to and must cease and determine, and the exclusive jurisdiction of the United States to govern therein must then also cease."

of the State, and not to *their agent*, the State government, and the political people had never been organized in reference to the Constitution of the United States, as a law of their organization. No sovereignty had ever been held *under* the Constitution; if it had, it would not have been sovereignty. The speaker had never attempted to show how the political people of the State had lost sovereignty.

[1] But why did not the speaker say, I deny that this is the *law*? He had put it, at this instant, as a question of law. I, too, deny that such was the *fact*. But the weakness with the arguments on all sides on this question was that all who participated in the debate argued it from the lawyer's point of view. (*Ante*, p. 109.) This applies even to those who advocated the conquest and State-suicide theories.

[2] In this sentence an entirely different view of the guaranty clause comes to the front, — the idea that the Constitution imposes a duty on citizens, as individual persons, to want to have a republican government. This was more prominent with other speakers on this question.

[3] It is not clear who the persons referred to are, who are to be governed by the sword until they do something, — whether they are individual natural persons, assumed, on the fact of their residence, to have been individually guilty of treason, or States. No natural person had hitherto been bound by law to petition for anything, under penalty of being governed by martial law for not petitioning. The States of the United States never owed allegiance to any body; least of all to persons constituting, as their agents, a government which rested on their continuing wills sustaining the written Constitution as law. Like all sovereigns, the *United* States protected themselves, this *government* being only one of their instrumentalities for that purpose.

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Mr. Bingham said further: —

"I desire to put this amendment into the preamble for the further reason that I wish thereby to notify in the most solemn form the men who constitute perhaps the majority of the people in those ten lately insurgent States, and who themselves were in open armed rebellion, that what they have to do and all they have to do in order to get rid of military rule and military government is to present to the Congress of the United States a constitutional form of State government [1] in accordance with the letter and spirit of the Constitution and laws of the United States, together with a ratification of the pending constitutional amendment.[2] That being done, sir, this military rule ceases and determines. I am sure of this, — that the American people will have rule, civil or military, in those insurgent States until they shall be fully restored to their constitutional relations.[3] And so far as they [*i. e.*, the American people] may be able, under direction of law and the authority of law enacted by their Congress,[4] they will protect all men in those States in life, liberty, and property, until they can be fully protected under an accepted constitutional State government. When men in those States shall have fulfilled their obligations, and when the great people themselves shall have put by their own rightful authority [5]

[1] "The constitutional form of State government" in these ten States was neither more nor less "in accordance with the letter and spirit of the Constitution" of the United States than it had been before the war; and "the laws" of the United States — that is, the Acts of Congress — were to be judged by that Constitution as much as were the laws of any State.

[2] Mr. Blaine, by his amendment (*ante*, p. 229, note), had squarely asserted that the pending amendment would be ratified by three fourths of the whole number of States, excluding these ten States. On this basis these States would have accepted the amendment as Territories accept the existing Constitution. Mr. Bingham's plan contemplated amendments, to bind all indiscriminately, being adopted by congressional coercion of some States included in the three fourths.

[3] In this sentence the States, as political personalities, are the parties to be dealt with. In the preceding sentence it was "the men who," &c., who were to exercise their right of petition. The States had not heretofore been imagined in the attitude of petitioners.

[4] Here "the American people," whose will in this matter is assumed to be supreme, are, at the same time, supposed to be under the direction of laws enacted by their own Congress; that is, their own agents.

[5] It would appear that "the great people" "by their own rightful authority" had yet to carry out "the nation's will"; so that "the great

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into the fundamental law, the sublime decree, the nation's will, that no State shall deny to any mortal man the equal protection of the laws . . . then, sir, by assenting thereto, those States may be restored at once."[1]

As has already been noticed, it cannot be known whether arguments like these of the mover of these provisions of the Act were those upon which the requisite majority of both Houses was secured; and it is shown by the recorded debates that there were other speakers who rested the power of Congress on an interpretation of the guaranty clause, or of something of the sort, which did not require any begging of the question through terms of doubtful meaning.

The reconstruction clauses of the Act of March 2, 1867, do not indeed affirm that, in proposing to these ten States a certain electoral basis for their future constitutions, Congress acted in execution of a general power to require each State, being one of the United States, to have any basis which it may judge indispensable to a republican form of government.

It could therefore be only from remarks made at the time by its advocates in Congress that any inference could be drawn that this act of legislation was founded on such a construction of the guaranty clause.

Even in Mr. Bingham's remarks in the debate on his proposal to insert these clauses, there were passages indicating a leaning to this view: such as that in which the phrase occurs, "present to the Congress of the United

people" and "the nation" are distinguishable, and apparently these States were part of this great people who had "a rightful authority" to be exercised in adopting amendments under the alternative of military rule!

[1] In these concluding passages the speaker was in harmony with Mr. Stevens, whose phrase, "so-called States," he had denounced. For Mr. Stevens did not claim a right to govern by military rule, *at this time*, upon conquest, as result of the war, but on the conduct of the white population towards the freedmen and their refusal to vote to adopt the Fourteenth Amendment; which is also Mr. Bingham's position in these remarks.

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States a constitutional government, republican in form, as required by the Constitution." [1]

From the course adopted by Mr. Stevens in reference to all amendments to the bill introduced by himself, there was little opportunity given to debate in the House on these reconstruction provisions until they had been incorporated in the amended bill as returned from the Senate, when the near end of the session excluded the opportunity for extended discussion.

At that point, however, in its history, Feb. 18, 1867, Mr. Bingham remarked of the whole bill as it was then framed: —

"We further say to the people of those States, 'If you wish to exercise the right of local self-government, do equal and exact justice, remodel your Constitution, adopt that constitutional amendment which to-day has the sanction of twenty-five millions of freemen in this land,[2] and you will be restored to your equal place and to all your political powers in the Union as States. Until you do this you shall be subject to such form of government as will best secure all men, without respect to race, color, or previous condition, their persons and property." Cong. Globe, p. 1319.

In the Senate, during the debates on this bill, very little allusion was made to the guaranty clause as the foundation of the power claimed. The supporters of these provisions of the Act, as well as those who approved the

[1] And, in reply to a question, Cong. Globe, p. 1083: "If we are not satisfied that these organizations are republican and just and equal and constitutional, we may require them to go further and to do something else."

[2] So far as the speaker could be informed, all he could say was that the amendments had the sanction of a certain number of *States* in their corporate capacity. If he proposed to rest their validity on the numerical majority of the inhabitants of the country, of whom no estimate had been taken, he had no right to count the minorities in each of these States as supporting the amendment. It is highly probable that, estimating for a majority of the nation as a mass of individuals, it was against the amendment. See remarks of Mr. Finck, of Ohio, on the same occasion. Cong. Globe, p. 1388.

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sections for military governments, as they stood in the original bill, seemed to have entertained a very simple theory of absolute dominion, whether founded on the guaranty clause, or on a doctrine of conquest, or on one of State-lapse. This was by some senators combined with the assumption that a new basis for government, in all the States, in universal "manhood suffrage" had, by some undescribed popular decree, become a part of the public law; or this may be taken as a new interpretation of the term "republican government" in the guaranty, as made known to them by something akin to a revolution.

There were, however, several other bills pending during the two sessions of the Thirty-ninth Congress which gave occasion to arguments founded on the guaranty clause; the question of power being the same as that presented by the Act of March 3, 1867.

At the time Mr. Stevens's bill was under discussion, a bill relating to Louisiana alone had been proposed,[1] which passed in the House only, being dropped in the Senate and in fact rendered superfluous by the more general application of the other bill. It contained provisions, somewhat similar to those incorporated into the other bill, for determining the elective franchise in the State. For this reason the arguments drawn from the guaranty clause in justification of those provisions would be of equal application to similar provisions in the other bill and, if used by speakers who were prominent as supporters of the latter, are of equal significance as indicating the view taken by the majority.[2]

[1] Reported from the select committee on the New Orleans riots by Mr. Eliot, of Massachusetts, Feb. 11, 1867, Cong. Globe, 2d Sess. 39th Cong. p. 1129; House Bill, 1162, entitled a "Bill for the Re-establishment of Civil Government in the State of Louisiana," which passed the House Feb. 12, 1867, — yeas, 113; nays, 30. Cong. Globe, p. 1175; Wilson's Hist. Rec. pp. 329, 333. The substance of the various sections of the bill was given by Mr. Shellabarger in his remarks of Feb. 12, 1867. Cong. Globe, p. 1173.

[2] Feb. 14, 1867, referring to House Bill No. 1143, the Louisiana Bill then

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Senator Wilson's Position as to "Manhood Suffrage."

In the debate, Feb. 15, 1867, in the Senate on the amendment to House Bill No. 1143, Mr. Wilson, of Massachusetts, said: —

"I believe, Mr. President, that the wisest thing would be to pass this bill just as it came from the House, and then to pass the Louisiana Bill, and then to pass a resolution reciting the fact that the constitutional amendment has been adopted by a sufficient number of States, and providing that those States in rebellion which will assent to the constitutional amendment, change their constitutions and laws in conformity with its requirements, give manhood suffrage, and put all its citizens, without distinction of color or race, under the equal protection of the laws, so that they may engage in all the avocations of life, have the benefits of the public schools, and stand on the same ground with all others, protected by just, humane, and equal laws, shall be thereupon entitled to representation in Congress by those who can take the prescribed oath. . . .

"Sir, universal manhood suffrage has ceased to be a contested issue in America. Although it is not yet incorporated into constitutions and laws, it is just as much an achieved fact in the ten rebel States as it is in the District of Columbia, the State of Tennessee, or the Territories. The battle of manhood suffrage is fought and won; all we have to do now is to provide for the formal incorporation of that principle into constitutions and laws." [1]

On Feb. 12, 1867, the Louisiana Bill being then in order, Mr. Shellabarger, a representative from Ohio, remarked: —

being in order in the Senate, Mr. Sumner said (Cong. Globe, p. 1303): "I am in favor of each of these bills. Each is excellent: one is the beginning of a true reconstruction; the other is the beginning of a true protection. Now, in the rebellious States, there must be reconstruction and there must be protection. Both must be had, and neither must be antagonized with the other. The two should go in side by side," &c.

[1] Globe, p. 1365; Wilson's Hist. p. 352. See also remarks by Mr. Allison, of Iowa, in the House, Feb. 12, 1867. Globe, p. 1181. It would appear from these remarks that there was something or somebody superior to the Constitution and laws they had sworn to support, to whom senators and representa- had to look before voting.

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Citation of Luther *v.* Borden, by Mr. Shellabarger.

"This important bill is precisely what its title indicates, one 'To provide a Civil Government for Louisiana.' The bill assumes, as the truth upon which it is based, a proposition that was uttered by him who administered the government before the present acting President of the United States came into power,[1] and which was repeated by the latter, — that these revolted States have lost their civil governments. It assumes nothing beyond that. It does not touch what has been to some extent the controverted question, whether their condition is exactly analogous to Territories or not. It simply attempts to restore to those States civil governments, nothing more, nothing less."

To this extent the argument was in harmony with that of Mr. Bingham on the other bill; but in the remarks immediately following, a different view of the action proposed is taken. Mr. Shellabarger proceeded to say: —

"Now let me remind gentlemen on the other side, who have asserted so earnestly that this bill is unprecedented in its legal aspects, that they forget that the Supreme Court of the United States, in a well considered case, and by an opinion which, according to my present recollection was unanimous, decided that the government of the United States, in its Congress, has the identical power upon which this bill proceeds, to wit, the power to decide whether the government in a given State is republican or not; and if it be found to be not of that character, to set it aside.

"That was decided in the celebrated Rhode Island case, so perfectly familiar to every gentleman of the House who is at all versed in these legal questions. . . . The Constitution itself speaks about a State being a State notwithstanding it may have lost its republican government. . . . He upbraids the bill because it speaks of Louisiana as a State. So does your Constitution speak of States as things which may be States and yet not have republican governments; because it assumes that it is possible a State, in the constitutional sense, may be a State and yet have lost its constitutional government. Is not that alphabetical constitutional law? . . . Remember that you are the representatives of this mighty nation, that here the voice of the American people speaks in execution of

[1] Compare as to Mr. Lincoln's view, *ante*, p. 86.

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Views taken as to the Application of the Guaranty.

the provision of your Constitution which says that you shall guarantee to the States a republican form of government. After this can any gentleman hesitate to carry out the obligation and to fulfil the duty imposed upon Congress that we shall see to it that these States are republican? . . . Now that is the point where this bill and every other bill proposing to reconstruct the States South must rest. It rests on the right and the duty of this part of the government to see that there is kept in each State a republican government. This bill says, we will neither have nor guarantee the government which is there now and which rests on a disloyal basis, as far as it has any basis at all."

Remarks of similar tenor were made in this Congress at different periods by other speakers. They might seem well enough suited, as arguments, to sustain the actual provisions of the reconstruction clauses of the Act of March 2, 1867, and, taken together, might indicate that a portion of the majority in each branch founded this legislation on the assumption that the governments then existing by the will of these States, as political members of the Union, were not republican in form; and that therefore these States, though neither conquered States nor lapsed States, might, under penalty of exclusion from representation in Congress and subjection to military rule, be required by the general government, as a superior, to receive a certain political organization supposed by Congress to answer to the term "republican in form" in the guaranty clause.

The greater number, however, of the arguments supporting this legislation in each branch of Congress consisted of propositions similar to those in Mr. Bingham's remarks, — that as a consequence of rebellion (that is, either the rebellion of the States, as such, or that of their inhabitants, as citizens of the United States) against the general government as a sovereign, these ten States had "destroyed their own governments" as matter of political fact, and so were deprived of lawful or legal government,

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View taken by the Supreme Court.

and therefore, as matter of law, could not be represented in Congress; and, though still States of the United States from whose consent the Constitution derived its authority as law (as was shown by their being reckoned in the calculation for amendments), were "disorganized States," and by being so disorganized were subject to the exclusive jurisdiction of Congress, whose duty it was under the guaranty clause to provide for them such governments as it might deem republican (by placing them, as States, under military control until a new political people should be organized to accept, as a State, certain conditions of existence, one of which should be the adoption of a constitutional amendment enabling Congress to pass such laws as had previously been unconstitutional), and so restore them, as States, to "their practical relations to the general government."

How far the Supreme Court may have agreed to such propositions, it would be difficult to judge. But from the language of the several justices already cited, it may be inferred at least that, if the court has accepted any action of "the political department" as an execution of the guaranty clause of the Constitution, it has been on the supposition that, as a political fact, these States were at the time without any State governments at all, rather than that, having State governments at that time, they were not "republican in form."

This, however, cannot settle the propriety of that action, because, on the confession of the court itself, the validity of the action of "the political department" is not matter for judicial determination.

It is, therefore, still open to inquire, How has there been any execution of the guaranty in this instance by the action of "the political department"?

Whatever may, as a legal question, be the proper interpretation of the clause in the Constitution, the only execu-

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tion of the guaranty which had been *judicially* sustained before this instance of State-reconstruction, consisted, —

1st, In recognizing as *already existent* a certain definite body of electors in a State as being the true political people of the State, or as being the State itself, in distinction from another more or less definite body of persons claiming to be the true body of electors, or, as such, the real State.

2d, In recognizing such State as *claiming* from Congress the performance of a duty, *i. e.*, the execution of the guaranty given by the United States.

This was all that had been done on the part of the government representing the United States at the time of Dorr's rebellion, so-called, in reference to the State of Rhode Island. The executive of the United States had recognized the body of electors constituted under the old charter of the colony, on their corporate claim, as the State which could claim the guaranty from the United States, in opposition to the self-constituted body also claiming to be the actual political people of the State.[1]

This, therefore, was all that was or could, as *judicial precedent*, be decided by the case of Luther *v.* Borden, to have been in accordance with the constitutional provision.

In Luther *v.* Borden, 7 How. 39, Chief Justice Taney said: "The courts have uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not." Here, "government" is shown by the context to mean the body of electors who, as the political people of the State, hold the powers of a State of the United States, — not the form of government, *as law*,

[1] This case, therefore, gives a definition of a State of the United States which justifies its citation in Georgia *v.* Stanton, *ante*, p. 48, note, and which is contradictory to Chase's definition, *ante*, p. 9.

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which they institute. The political power — those who hold the political power of the general government — decide, in the sense of *recognize*, who those are who constitute the State *government* in this sense. A power to constitute the political people of the State is, therefore, not recognized in this judicial precedent.[1]

The precedent given by the Rhode Island case did not serve as a guide to the congressional system of reconstruction, because, by the words of the Constitution, the guaranty was to a State; that is, to some political personality as distinguished from any natural persons. The claim upon the United States which it created was one which can belong only to such a political personality, and as such it is to be distinguished from any rights held by natural persons under law, which each may individually forfeit by rebellion, treason, or other criminal act.

Under the congressional system of reconstruction, the pre-existence of the political personality, that is, of *a political people* of each of these States, capable as such of having a claim under the guaranty, was denied. For, if there was any such people at that time, it was that organized political people whose action, by a government of their own choosing, Mr. Johnson was then sustaining, as his fulfilment of the same guaranty,[2] — the same political people which Mr. Lincoln had regarded as in existence, and which had sustained the Secession Ordinances.

[1] The *caption* of the report is, "The question, which of the two opposing governments was the legitimate one, viz., the charter government, or the government established by the voluntary convention, has not heretofore been regarded as a judicial one in any of the State courts. The political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." 7 How. 1. The *political department* here referred to is, apparently, not a part of the general government, but of the State governments. The term "political *department*" was not Judge Taney's. Compare *ante*, p. 20, note.

[2] See Memoir of B. R. Curtis, i. pp. 383–387.

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The State not found in Loyal Citizens.

In this, however, Congress was inconsistent; having repeatedly recognized the existence of the same political people in these States, as by accepting their action in adopting the Thirteenth Amendment and offering the Fourteenth to them, before this legislation.

According to one of the ideas of executing the guaranty in the instance of these States, which have had their advocates, the recipients of its benefit are supposed to have been certain natural persons, individual citizens, either such as were assumed to have been individually always *loyal;* or such as had not *forfeited*, under legislative attainder for treason, their personal claims upon the United States under the guaranty; or such as, having been *disloyal*, and having so forfeited their claim, were required to give proof of loyalty by accepting a prescribed form of government, under the alternative of continued military rule.[1]

It has, probably, been thought in accordance with the precedent furnished by the case of Rhode Island, to say that, in the instance of these States, it was competent for Congress to discriminate a *loyal people* as being *the State*, however few in number, as compared with a *disloyal people*, however numerous.[2]

A State of the United States was the body corporate acting by a majority of its political people. The loyalty

[1] Compare Mr. Lincoln's language, *ante*, pp. 35, 36; also the statement of his view of the subject in Memoir of B. R. Curtis, i. 885–6.

[2] As in Mr. Attorney-General Stanbery's argument for the defendant, in Georgia *v.* Stanton, 6 Wall., so "They [*i. e.* the State] are precisely in the situation pointed out by the Constitution, — a State in insurrection; a lawful State warred upon by an unlawful, unauthorized body claiming to be a State, using force against force that the rightful State cannot overcome. Then comes a case for political interference. Then Congress and the President must decide which of the two is the rightful State, and when they decide it, it is decided for this court and for all: that is the only tribunal that can decide it." The supposition of two States in one political people, a lawful people and an unlawful people in one body, suggests the propositions offered to the court in Keith *v.* Clark, as to the State of Tennessee. p. 23. Compare *ante*, p. 148.

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or disloyalty of individual inhabitants of a State had nothing to do with the validity of any claim of the corporate body. The claim of a State as a corporate body did not depend upon any loyalty or disloyalty on its part; because, up to that time, there never had been anybody in existence to whom the States, being States of the United States, were bound to be loyal. Even if, before 1861, the States were bound to be loyal to anybody, it certainly was not to Congress, not to the persons who administered the general government, nor to the written Constitution, which is a thing and not a person. If anybody was bound to loyalty to any other person, he was so bound to somebody for whom the persons constituting the general government were only the agents, under the written Constitution, and from whom that written Constitution derived its force as law. That person, as shown by history, was the States united, including these ten States, *if they were then States of the Union.*

Though it may thus appear that the action of Congress in this instance has not been in accordance, as an application of the guaranty clause, with the actual *precedent* furnished by the instance of Rhode Island, it may, perhaps, be regarded as the development of a *dictum* by Chief Justice Taney, in the case of Luther *v.* Borden,[1] as meaning to say that the discrimination of the persons constituting the political people of the State, as made in that instance,

[1] 7 How. 42. "Under this article it rests with Congress to decide what government is the established one in a State. For as the United States guarantee a republican form of government, Congress must necessarily decide what government is established in a State before it can decide whether it is republican or not." In the instance of Rhode Island, neither did the Executive nor did Congress undertake to sit in judgment on the nature of the government established by the political people of the State. So far as that transaction indicated the construction of the clause, it was that the government fulfils the guaranty of a "republican form of government" to a State when it recognizes and sustains an existing political people as being the State; and therefore the judicial dictum was in contradiction to the political precedent.

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was merely incidental to a duty devolved upon the general government to determine whether the State *government*, that is, the formal constitution established by that people as law, was republican or not in its nature or quality.

This appears to have been put forward by some persons as equivalent to a judicial opinion that it has always been within the competency of Congress to decide upon the validity of provisions established by the political people of each State as their constitution of State government, either, —

1. Because a standard of what constitutes a republican form of government has been given by some superior, to which each State has been bound to conform; or,

2. Because the term "republican government" is here equivalent to any form of government which Congress may at the time deem republican.

This is giving an entirely new construction to the clause, and one which of itself turns the whole political constitution of the country inside out.[1] Heretofore it had been under-

[1] In the debate in the Senate, Dec. 19, 1866, on the condition introduced in the bill admitting the State of Nebraska (14 U. S. Stat. 392), respecting "the denial of the elective franchise or any other right to any person, by reason of race or color," &c., Mr. Reverdy Johnson remarked that the power to impose such a condition had been placed upon "the guaranty clause," and said, "If it can be maintained under that clause, it can only be because a Constitution which denies to any of the citizens the right to vote is not republican. That would lead to very perilous consequences. What State is there in the Union that admits everybody to vote who has the age and residence which their laws require, even supposing they have a right to prescribe age and residence? Not one, as far as I am advised. Which of the States represented in the Convention of 1780, and which afterwards adopted, through their people, the Constitution framed by that Convention, admitted all to vote who had the prescribed age and residence? Not one. . . . If it is not of a republican form now, it was not then. Can there be a doubt about it? Contemporary construction, to be ascertained by what is not done as well as by what is done, is a familiar rule of interpretation, not only persuasive, but controlling. . . . Nobody even dreamed that the United States had any authority; and the United States not only never attempted to exert it, but, as far as I am advised, no member of Congress, until the last few years, ever suggested it." The senator instanced the recent States, — Nevada, Oregon, and California. Cong. Globe, pp. 189, 190.

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stood that the word *republic* signified a certain self-determining body of citizens, having the power, as a corporate political personality, to establish, as by their sovereign autonomy, their own form of government, their own public law; and that a *form* of government so established was the only one which could be called *republican*. Therefore, that which the United States, *i. e.*, the States in union, reciprocally guaranteed must have been the possession of such a power, by each State as a political people, being in union as one of the United States; they imposing in this clause a duty upon those who should, as their servants or agents, administer their will under the Constitution.

By this new construction the positions of the holder of *the claim* and the holder of *the obligation* are reversed. It becomes *a power* in the governing agent to control the existence of those upon whose continuing wills, as possessors of sovereignty in union, that governing agent had depended for its delegated authority. The *claim* upon the agent has been turned into a *duty* due to that agent; if it is the right and power of the general government to see to it that each State, or each political people of a State, maintains a system of public law, such as may, in the estimate of that government, deserve the designation of *republican*.

By this construction these few words of the Constitution, which received little consideration from the Convention,[1] become the fundamental provision of the whole public

[1] This provision originated in Resolution No. 11, of fifteen offered, May 29, 1787, in the Convention, by Randolph of Virginia: "That a republican government and the territory of each State (except in the instance of a voluntary junction of government and territory) ought to be guaranteed by the United States to each State." Elliot's Debates, i. 45. It was moved and seconded, June 11, 1787, to agree to the eleventh resolution submitted by Mr. Randolph, amended to read as follows: "*Resolved*, that a republican Constitution and its existing laws ought to be guaranteed to each State by the United States. Passed unanimously in the affirmative." Ib. pp. 169, 182, v. 182. In the draft offered Aug. 6, 1787, Art. xviii., it is as it now stands. More debate occurred, July, 1787. Elliot's Debates, v. 332.

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Whether the Guaranty had been claimed.

law, effecting an entire reversal of that investiture of sovereign power by which the written Constitution became a law; because, by this, the political people of the States united, from whom it proceeded, are made dependents on the will of their own servants as organized under that Constitution.

But the theory of reconstruction by executing such guaranty fails, not only because Congress would not recognize within the territory of these States an existing political people, capable, as a State, of receiving the guaranty, but also because the idea of guaranty presupposes a party in existence, who is desirous of the benefit of the guaranty.

The people of these States — meaning either the political people or the mass of the inhabitants — had by their own free action spurned the guaranty by rejecting, as far as they could, their connection with the United States, the guarantors, and with the government instituted under their law in the Constitution in which this provision is contained, and by this abandoned all claims which a State of the Union can have, as a State, on the United States, or on Congress or the Government as their agent.

It is besides recorded in the debates in Congress, as well as implied by the language of the Reconstruction Statutes, that the new amendments were to be forced upon the populations of these States, if States they must be called, as conditions for their being allowed to reorganize a local government, and to appear by representation in Congress and to participate in the election for President.[1]

[1] See Act of April 10, 1869, 16 U. S. Stat. 40, authorizing the submission of the Constitutions of Virginia, Mississippi, and Texas to a vote of the people, &c. Sect. 6, that before the said States "shall be admitted to representation in Congress, their several legislatures which may be hereafter lawfully organized, shall ratify the fifteenth article, which has been proposed by Congress to the several States as an amendment to the Constitution." Also, the Act of Dec. 22, 1869, *ib.* p. 59, to promote the reconstruction of the State of Georgia. Sect. 8 has a similar proposition.

In view of these facts, compare, *ante*, p. 19, citation of the points taken in White *v.* Hart, 13 Wall. 649, and Mr. Justice Swayne's remarks, accepting

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Whether the Conquest Theory may apply.

If, in the instance of these ten States, there was not sufficient evidence that the pre-existing political people did not stand in the position of desiderants of the guaranty, it is difficult to conceive of a case where it should not be wanted. But if the wishes of the pre-existing political people were immaterial in this instance, then there was really no State of the United States to be consulted; or only *a State* in Chief Justice Chase's interpretation of the word, as being mere land and population within the general domain,[1] and no more a State, capable of receiving the guaranty, than any Territory, — prospectively a State.

As has been already observed, it cannot be demonstrated from the debates which accompanied this legislation that Congress proposed to act in execution of the guaranty; and, therefore, on allowing all objections to its applicability in this instance, the question arises, whether this legislation should not be accepted as the affirmation of the doctrine of a conquest of these States.[2]

But here it is necessary to bear in mind the essential difference between the portion of the Act originally known as Mr. Stevens', bill, and the part which originated in Mr. Bingham's amendments.

The bill introduced by Mr. Stevens related only to the establishment of military governments over the ten States, without reference to any reconstruction or restoration to an equality with the other States. To sustain the provi-

the action of Congress as conclusive as to the voluntary character of the State's action. Such statements require the fiction of a loyal minority being the State, or of a loyal State conquered by a disloyal one within the same State limits; as was argued by the attorney-general in Georgia *v.* Stanton, *ante*, p. 252, note.

[1] *Ante*, p. 14.

[2] It is under an exposition of the guaranty clause that Judge Cooley indicates "the legislature of the Union" as "the proper authority" for reconstruction "whenever a State government has been displaced by rebellion or other force." The General Principles of Const. Law, &c., p. 197. Judge Cooley presents this as a doctrine of constitutional *law* settled by the decisions of the Supreme Court in Texas *v.* White and Luther *v.* Borden.

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sions of this bill, forming the first four sections of the Act as passed, more was necessary than a recognition of the exclusive jurisdiction of Congress as in a Territory; whether that jurisdiction should have been gained by State-lapse, or by international conquest, or in any other way. For, whether the general government then held dominion as a conqueror *after* a war, or as legitimate sovereign *after* a suppression of a rebellion, in either case the military authority should, by constitutional law, be subordinate to the civil.

For this reason, when Mr. Stevens and others who supported his bill urged the political rights gained after a conquest, they were in reality claiming the rights of belligerent power, as if the state of war still continued, contending that the disloyalty of the white population, shown by their treatment of the freedmen, and above all by their non-adoption of the proposed amendments, made the people of these States public enemies as long as this "disloyalty" should exist.[1]

[1] On the 12th of February, 1867, in his remarks on the Louisiana Bill (*ante*, p. 246), Mr. Shellabarger said, "I shall confine what I have to say touching the power of Congress to pass the bill principally to our power to employ the military forces for the purpose of enforcing law and order, as this bill and the one reported by the Reconstruction Committee do, because, as the greater includes the less, if it shall appear that we can use the military force, as provided by the bill, *a fortiori* we can the civil authority also. Are, then, the State of Louisiana and its people in that condition and state of fact which under our government make it legal to control them by military force? As I said the other day, this is a question of law dependent, for its answer, upon a state of fact. That question of fact is exactly this: Is there in Louisiana such a remaining state of hostility, insubordination, and rebellion to and against the authority of the United States as that the courts cannot and will not redress personal grievances nor protect the loyal people?" The argument proceeds to apply "the law of nations" as controlling the case. Cong. Globe, p. 1174.

In the Senate, Feb. 15, 1867, on the question of amending House Bill No. 1143 (*ante*, p. 231), Mr. Lot M. Morrill, of Maine, remarked, "When he [another senator] talks about the apprehension of being accustomed to military authority and that here is an imposition of military governments, he is mistaken. It is no such thing. It is simply in the nature of an article of

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Whether the Conquest Theory may apply.

This portion of the Act of March 2, 1867, presented, therefore, a question of constitutional *law*, properly so called, which was essentially distinguishable from the question of a conquest, as a basis for that system of reconstruction which was presented by Mr. Bingham's proposed amendments, afterwards incorporated into the same bill. But before introducing those propositions, Mr. Bingham had repudiated, for himself, the idea of a conquest, by his criticism on the bill as introduced by Mr. Stevens.

In the debate in the House, Feb. 7, 1867, on this bill, Mr. Bingham said, —

"I challenge any man here to-night to point to any statute passed by the Congress of the United States, since the opening of this revolt on the part of the insurgent States to this hour, that, by implication or otherwise, by direction or indirection, intimated the dogma of the chairman of the Committee of Reconstruction on the part of the House with which he opened this debate, — that those insurrectionary States were foreign and conquered country."

Mr. Bingham proceeded to cite various Acts of the Legislature in support of his view. Cong. Globe, p. 1080.

Though it may be proved, as far as anything of the sort can be proved, that the idea of conquering or even coercing the eleven States, as political personalities, had been, in words, repudiated by all branches of the government from the first, and though it may be clear enough to some minds that this idea involves that of international warfare between sovereigns, and was a practical recognition of the position taken by the eleven States before and during the war, still it seems highly probable that by many in Con-

war, or a rule for the government of the army in a conquered country, and that is all it is. Sir, by the triumph of our arms we have overthrown rebellion and civil war. These civil and political communities, recently in insurrection and war, are subdued and at our feet. I assume that there are no civil tribunals there, no State governments which we are bound to respect, or which it is safe for us to respect and trust." Cong. Globe, p. 1367.

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Conquest and Belligerency: how related.

gress at the time, as well as by many other more or less influential persons, it has been regarded as the true basis for the reconstruction of the Southern States, as well as for their temporary subjection to military rule.[1]

In every instance of a public war, two belligerent parties must be presupposed; and when a war may have ended by the military defeat of one of the belligerents, that belligerent must occupy one of two positions in reference to the successful party.

1. The defeated belligerent may be recognized as a political personality, capable, by reason of his pre-existing *status* alone, that is, irrespectively of the amount of military force he may have displayed, of exercising the *vis bellica*, being then a belligerent *de jure*. In this case the war has been an international war, whatever may have been the titular designation by which the two adversaries had been known to each other and to other nations; and this character of the war protects all persons acting under the direction of either belligerent from all criminal jurisdiction of the victor when hostilities have ceased.

In this case, whether there will be any change of dominion over the territory and population of such defeated belligerent, such as is meant by the word "conquest," taken technically, will depend on the will of the prevailing antagonist, who may or may not become a conqueror, in the technical sense, as well as the victor.

[1] The theory of an international conquest, pure and simple, was, however, rarely advocated. One of the most noted expositions was that in a speech in the House of Representatives, Dec. 12, 1861, by Mr. M. F. Conway, of Kansas, which was of importance principally from being one of the earliest assertions of the power of the commander-in-chief to emancipate the slaves of a belligerent enemy, which was afterwards supposed to have been exercised by Mr. Lincoln. (*Ante*, p. 195.) To support this, Mr. Conway took the position that, when recognized as a belligerent, the Confederate States became a distinct nation; so that treason or rebellion could not be predicated of them or of their citizens. Cong. Globe, 2d Sess. 37th Cong., p. 82.

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2. On the other hand, the unsuccessful belligerent may be distinguishable only as a temporarily organized collection of persons, beginning its existence only with the war and ending with it, being then a belligerent *de facto*. All persons, who have acted with it, as aiding and abetting it, are protected under its belligerent capacity as to acts connected with military operations; being thereby exempt from civil and criminal prosecutions for damages to property, and for trespass, arson, murder, etc. Yet they remain exposed to the penalties of treason at the option of the victor, as of a belligerent who has vindicated his pre-existing law and political constitution.

But the same conditions exclude the idea of that change of dominion and jurisdiction which we call *conquest*. The victory in this case consists in the confirmation of pre-existing dominion and jurisdiction.

Therefore, with that theory of belligerency which admits of conquest as resulting from success, there could be no treason and no "disloyalty"; and with that theory of belligerency which admits of punishment for treason or for "disloyalty," as resulting from success, there could be no conquest.[1]

As the matter now stands in the public law of the world, foreign nations are ready to accept that view which excludes the idea of a conquest of these States; because they assume that any conquest must be excluded by our own view of our internal public law.[2] Yet it may be conjec-

[1] Compare, *ante*, pp. 164–205.

[2] This was illustrated in the suits brought by the United States in English courts for recovery of property held during the war by agents for the Confederate government. (*Ante*, p. 173, n.) But where the relations of non-resident subjects of neutral nations are concerned, a conquest might be supposed; or more strictly speaking, the rights and obligations of such persons might be determined as if there had been a conquest, so far as they were concerned. This, I think, could have properly been taken as the real principle for the decision of the English Vice-Chancellor in United States of America *v.* Prioleau, 2 Hemming and Miller's Chancery Rep. 559, and, with-

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tured that the actual military success of the government has, by foreign nations, been regarded as much more in the nature of conquest than of suppression of a rebellion,[1] and that, if the result had been otherwise, the establishment of the Confederacy would have been accepted, not so much as a result of successful revolution as of legitimate warfare to sustain pre-existing political independence.

According to the view herein taken of the effect of the Secession Ordinances followed by civil war, and of the limitations which should have accompanied the exercise of belligerent rights, the success of the government of the United States could have none of the character of a conquest. But this does not involve the conclusion that the eleven States would simply have stood again in their former places, like so many truant school-boys, repentant or unrepentant, the jurisdiction of the government being no less and no more than before, — which was the so-called "conservative" doctrine.[2] It would follow from the view here maintained as to the operation of the State ordinances, followed by the attempt to give them practical effect, that the result of the success of the government would be the

out at all compromising the plaintiffs, might have been recognized by their counsel in the case of United States *v.* McRae, 8 Law Reports, Equity, 69. As far as such subjects of neutral nations were concerned, it was the same, whether the Confederate government was a government *de facto* or *de jure*. In a foreign court of law, the government of the United States might have recognized the validity of the relation between the defendant in the neutral country, as agent, and the Confederacy, as his principal, and have settled with him as succeeding, *by conquest*, to the claims and obligations of the Confederacy, as far as he was concerned, without any compromise of its position on its own domain, as towards the rebellion. To take such a position in a foreign court would not involve recognition of the Confederate government as a property-holder within the limits of the States. But a different view of these cases was taken by Field, J., in the dissenting opinion, in Sprott *v.* United States, 20 Wall. 473.

[1] Compare the citation from Phillimore, *ante*, p. 134, note.

[2] That is what was so designated at the close of the war. Compare the Report of the Committee on Reconstruction, *ante*, p. 42, 43, [a], [c].

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establishment of its authority, as in a supposed case of its *re*-establishment in a Territory of the United States, after a local rebellion; or as would be the case in the suppression of a rebellion in a country under an integral, undistributed, or unitary government.

To indicate more clearly what I do *not* mean to support, while rejecting the supposition of a conquest of the eleven States, I quote here, from the opinion delivered by Judge Sprague in the case of the Amy Warwick, a portion which has often been cited in arguments on the question of the status of these States after the war.[1]

The portion of the opinion to which I refer is found in 2 Sprague's Decisions, p. 147.

"An objection to the prize decisions of the District Courts has arisen from an apprehension of radical consequences. It has been supposed that, if the government have the rights of a belligerent, then, after the rebellion is suppressed, it will have the rights of conquest; that a State and its inhabitants may be permanently divested of all political privileges and treated as foreign territory acquired by arms. This is an error, — a grave and dangerous error. The rights of war exist only while the war continues. . . . Conquest of a foreign country gives absolute and unlimited sovereign rights. But no nation ever makes such a conquest of its own territory. . . . The nation acquires no new sovereignty, but merely maintains its previous rights. . . . And when, in this civil war, the United States shall have succeeded in putting down this rebellion and restoring peace in any State, it will only have vindicated its original authority and restored itself to a condition to exercise its previous sovereign rights under the Constitution. In a civil war the military power is called in only to maintain the government in the exercise of its legitimate civil authority. No success can extend the powers of any department beyond the limits prescribed by the original law. That would be not to maintain the Constitution but to subvert it. Any Act of Congress which would annul the rights of any State under

[1] As in Minority Report of the Committee on Reconstruction, Rep. No. 30, 39th Congress, part 1, p. 4. Lawrence's Wheaton Int. Law, p. 605, Editor's note.

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the Constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the Secession Ordinances with which this atrocious rebellion commenced. The fact that the inhabitants of a State have passed such ordinances can make no difference. They are legal nullities: and it is because they are so that war is waged to maintain the government. The war is justified only on the ground of their total invalidity."

Judge Sprague, it will be remembered, rested his decision of this case on the principles of prize law, applicable against *alien* enemies in international warfare.[1] Therefore, in denying the possibility of the government's acquiring "absolute and unlimited sovereign rights," as on conquest of a foreign country, this portion of his opinion was in opposition to that view of the political facts on which alone his judgment in the case could be sustained. By upholding his decision condemning the vessel, the Supreme Court accepted those premises which conflicted with his own limitation of the political consequences of the military success of the government. The court has never, I believe, repudiated in terms this portion of his opinion, though it has accepted, as not inconsistent with the written Constitution, that action of the political department which has discredited the judge's exposition of the prospective *status* of the eleven States.

Still, it may be questioned whether any more intelligible and consistent explanation of the prospective position of the government, after having asserted the rights of a belligerent, has ever been given by the national judiciary than that which was attempted in this opinion by Judge Sprague in 1862. It was accepted, I believe, at the time by all who supported the war measures of the government. It was, as far as can be known, the idea which Mr. Lincoln entertained, and which he attempted to apply in his own methods of reconstruction. It was that to which Mr.

[1] *Ante*, p. 169.

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Johnson professed his adherence afterwards, and which became the foundation of his disagreement with Congress. This opinion was expressly referred to in the Minority Report from the Committee on Reconstruction as doctrine on which the war had been conducted, but according to which the measures proposed by the majority were unconstitutional and revolutionary.

All that the Supreme Court has done since this opinion was delivered has been to accept the political situation without being able to explain it.

The theory of conquest, as in an international war, involves the supposition that the States composing the Union held sovereignty in severalty. It is therefore necessarily in contradiction to the theory of State lapse which I have herein presented as a consequence from the fact that the States were always sovereign in union, but never otherwise. It has been seen, however, that those who in Congress were known to have held a certain doctrine of State-suicide found no difficulty in supporting the bill originally introduced by Mr. Stevens, professedly based on the doctrine of conquest, or thought it unnecessary to distinguish their own ground for supporting it as being different. But the explanation of this is given in the fact that the intention of the supporters of that bill was, not reconstruction, but to place military above civil authority on the foundation of a supposed continuing state of war; which being accepted, the political status of the State, as either conquered or lapsed, was matter of indifference.[1]

From the fact that the resolutions of Mr. Sumner of Massachusetts, and of Mr. Howe of Wisconsin, in the Senate, and of Mr. Boutwell of Massachusetts, in the House, affirming a doctrine of State-suicide, were all tabled,[2] it would

[1] Compare *ante*, p. 254.

[2] Mr. Sumner's Resolutions, Feb. 11, 1864. Macpherson's Hist. p. 322. Mr. Boutwell's, Feb. 16, 1864, *ib.* p. 328. Mr. Howe's Jan. 10, 1866; Cong. Globe, 15 Sess. 39th Cong. p. 162.

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appear that it was at no period acceptable to Congress, and therefore, though the authors of these resolutions finally supported this reconstruction legislation of the Thirty-ninth Congress by their votes, their arguments in support of those resolutions cannot be cited as indicating the theory assumed for this legislation.

As observed already, the arguments by which this legislation was supported in Congress at the time, are not necessarily the only arguments, or the best possible arguments, to support such legislation. Here, they have been cited rather as part of the *res gestæ*, or to show the *intention* of the transaction as a political fact, than as arguments by which the accordance of such legislation with the actual national existence should be judged.

It may be that better arguments for such legislation have been presented by private citizens, or such as had no political functions, as legislators, at this crisis. Such arguments of course can have no claim to authority, either as justification or explanation of the action of Congress, whatever may be the reputation of their authors or their intrinsic merit. Yet, whether intended to support or to oppose the actual legislation of Congress, they may assist in indicating the political theory supposed to have been applied, even if they could not be regarded as being on the same level, in that respect, with remarks made in Congress itself.

It will not be difficult to recall the fact that an acrimonious political controversy at the North accompanied the whole course of the secession rebellion, the war, and the reconstruction era, expressed not only by forensic discussions, but in a flood of printed publications. Some of these, of a date earlier than the close of the war, have already been noticed in connection with the question of belligerency. The actual military suppression of the rebellion and the distinct issue raised by the opposition between President Johnson and the majority in Congress

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gave occasion to a variety of pamphlet essays, review articles, etc., more especially directed to the question of reconstruction, which brought out more clearly the differences of opinion existing among those who had joined in supporting the government during the war.

To attempt anything like a critical review of these more or less ephemeral productions, as a manifestation of public opinion, would of course be a task as hopeless as any analysis of the multifarious discussions in the journals of Congress. It is sufficient to notice that the differences of view in these publications would, almost of necessity, correspond with those seen in the debates in Congress at the same time on the same subjects, and that they would answer either to the so-called conservative view, or to that founded on the guaranty of republican government (either to "disorganized States," or to States whose institutions were not then republican), or to that founded on the conquest theory, blended more or less with some theory of a State-suicide.

There are, however, some of these which may here receive special notice, not merely from their intrinsic or comparative merit, but more particularly as written by authors of high reputation as individuals, who, at the same time, were closely associated with that school of political doctrine for which Judge Story and Mr. Webster were leading authorities.[1]

I think I need feel no hesitation in referring to articles published from time to time in the North American Review, during the period from 1861 to 1867, as eminently entitled to consideration as indices of opinion.

In the numbers in this Review commencing with April, 1861, and ending with October, 1862, the articles bearing most directly on the constitutional questions arising from the Rebellion were contributed by the late Joel Parker,

[1] *Ante*, p. 113.

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Royall Professor in the Law School of Harvard College, Cambridge, Massachusetts.[1]

In the latest of these articles is the following passage: —

"The case stands thus. If the Rebellion is suppressed and the seceeding States are 'subjugated,' they return to their places in the Union, with all the rights and privileges which they had before; unless by the tenacity of their resistance they aid the abolitionists in getting up another revolution founded on immediate emancipation, through conquest or State-suicide, and a prostration of State rights not warranted by the Constitution."

The earlier articles contributed by Professor Parker were in harmony with this, and agreed with the view taken by Judge Sprague in the extract last cited from his opinion in the Amy Warwick. Professor Parker's contributions to the Review were succeeded by others of a different tenor relating to the same general subject.[2]

Among those who must always be classified with the "best minds" of any part of the country, was the late B. R. Curtis,[3] of Boston, whose letter, July 25, 1866, addressed to the so-called Conservative Convention at Philadelphia, of Aug. 14 of the same year, may be found in his Memoir vol. i., p. 390, in which he sustained the same view as against the doctrines of conquest, State-suicide, and recon-

[1] At one time the Chief Justice of the Supreme Court of New Hampshire. These articles were: July, 1861, The Right of Secession; October, 1861, Habeas Corpus and Martial Law; April, 1862, Constitutional Law; July, 1862, International Law (supporting the seizure of Messrs. Mason and Slidell); October, 1862, The Character of the Rebellion and the Conduct of the War.

[2] He also published, however, in pamphlet, lectures delivered before the Law School, in January, 1865, and January, 1866, entitled Revolution and Reconstruction, and in 1869 an address delivered at Dartmouth College, New Hampshire, published under the title, The Three Powers of Government. The Origin of the United States, and the Status of the Southern States of the Suppression of the Rebellion. The Three Dangers of the Republic.

[3] Associate Judge of the Supreme Court of the United States from 1851 to 1857.

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struction by the supposed guaranty of republican government. One paragraph only can here be quoted: —

"After much reflection, and with no such partiality for executive power as would be likely to lead me astray, I have formed the opinion that the Southern States are now as rightfully, and should be as effectually, in the Union, as they were before the madness of their people attempted to carry them out of it; and in this opinion I believe a majority of the people of the Northern States agree." ib. p. 393.

Other gentlemen, also in the legal profession and equally well reputed in the same community, advocated in their publications a view more in harmony with that given in Mr. Bingham's remarks in Congress, which they preceded in point of time, than with any other.

In a letter[1] of Judge Redfield to Senator Foot of Vermont, dated Boston, Sept. 30, 1865, the writer took the position that the State remained unaffected by any ordinance of secession or any acts of rebellion; while its political capacities continued vested in the "loyal persons" to be found therein; that, as "the war had demonstrated the incompatibility of slavery with the successful operation of the national government, it may therefore insist upon its abolition by the States;" that, though "the regulation of the elective franchise is reserved and conceded to the States," yet, under the guaranty of republican government, they may be compelled to admit the emancipated slaves to suffrage, because "republican government implies the representation, in some form, of the entire population."

Another publication, sustaining similar views, appeared about the same time from the pen of the late Mr. Charles

[1] Printed first in the Rutland Herald, afterwards in pamphlet. Isaac S. Redfield, then of the Boston bar, author of several legal treatises, had been Chief Justice of the Supreme Court of Vermont. His earlier publication on the international aspect of the war has been noticed, *ante*, p. 205, note.

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Views taken by Mr. Bishop and Mr. Lowell.

G. Loring, a gentleman of very high standing at the Boston bar. A portion of this essay, part ii., ch. i., was especially directed in answer to Judge Curtis's letter already mentioned. In this publication the power of Congress to prescribe conditions for new constitutions of State government was maintained by arguments substantially like those afterwards presented in Congress by Mr. Bingham.[1] But, in justifying the system of military governments, there was a more distinct leaning to some doctrine of State-suicide, or of conquest.

Mr. Bishop, a well-known author and member of the Boston bar, in a pamphlet which has already been cited,[2] stated the case as follows: —

"The seceded States are still States in the Union, but they are denuded of their State governments (this is the position of the present pamphlet). . . . The United States must clothe the States with republican governments under the Constitution, taking for the purpose the material which presents itself, namely, the negroes and the loyal whites. This last answer brings us again to the doctrine which this pamphlet maintains. It is what the writer believes to be the doctrine of the law, and in all the discussions which the times have brought out, no man has yet appeared to controvert on any basis of legal authority this doctrine."

After the termination of Judge Parker's contributions to the North American Review, the articles, for the ensuing two years, most directly bearing on the political question of the time were contributed by Mr. James Russell

[1] Reconstruction. Claims of the Inhabitants of the States engaged in the Rebellion to Restoration of Political Rights and Privileges under the Constitution. Boston: Little, Brown & Co. 1866. Pp. 126. This pamphlet was specially reviewed by Judge Parker in the address delivered at Dartmouth College.

[2] *Ante*, p. 206, note. Secession and Slavery, or the Effect of Secession on the Relation of the United States to the Seceded States and to Slavery therein: Considered as a Question of Constitutional Law, chiefly under the Decisions of the Supreme Court, embracing also a Review of the President's Plan of Reconstruction. A. Williams & Co., Boston. 1864. Second edition. 1866.

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Lowell, of Cambridge, Massachusetts.[1] These articles were not merely in opposition to the so-called conservative theory upheld by Judge Sprague, Judge Parker, and Judge Curtis, but were mainly expository of the idea of a conquest of slavery as a principle personified, rather than of a conquest maintaining any particular political supremacy; and asserted a power and duty of Congress to make the equality of all persons the basis of State existence, at least in the instance of the ten Southern States. This may appear from the following extract from the article in the July number, 1865, p. 201.

"What have we conquered? The Southern States? The Southern people? A cessation of present war? Surely not these or any of these merely. The fruit of our victory, as it always was the object of our warfare, is the everlasting validity of the Declaration of Independence in these United States and the obligation before God and man to make it the rule of our practice. It was in that only that we were stronger than our enemies, stronger than the public opinion of the world; and it is from that alone that we derive our right of the strongest, for it is wisdom, justice, and the manifest will of Him who made of one blood all the nations of the earth."

It can hardly be said of any of these writers, who, against the so-called conservative doctrine, supported the power of Congress to impose new governments, as republican, upon the ten States as "disorganized States," that they rested their argument on either the theory of conquest or on that of State-suicide, though many passages might be

[1] At that time Professor of the French and Spanish Languages and Literature and of Belles Lettres in Harvard College, Cambridge, Massachusetts; afterwards Minister to Spain and to England. The articles were: January, 1864, the President's Policy. (This called forth the letter from Mr. Lincoln to the editors, dated Jan. 16, 1864: Macpherson's History, 336.) July, 1864, The Rebellion: Its Causes and Consequences. October, 1864, The Next General Election. April, 1865, Reconstruction. July, 1865, Scotch the Snake, or Kill it? January, 1866, The President on the Stump. October, 1866, The Seward-Johnson Reaction.

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Attitude of these writers towards Webster's opinions.

found in the publications of each which are consistent with one or the other doctrine and with no other.

Senator Sumner and Mr. Boutwell, both of Massachusetts, were, as has been noticed, pronounced advocates for the doctrine of State-suicide as a consequence of the ordinances of secession followed by actual warfare; though, from their agreement with Mr. Stevens, in reference to his bill in the thirty-second Congress, it may be inferred that they made little objection to calling it a conquest.[1]

In view of the position occupied in their own State by the gentlemen whose individual opinions have just been noticed, no one would dispute their right to be mustered among the "best minds of New England," and there can be little question that they all held, more or less definitely, in common with Mr. Webster, those opinions which his biographer has described as constituting "the sole ground upon which the supremacy claimed by the Constitution, as the supreme law of the land, can be maintained."[2]

But, on this question of reconstruction, these gentlemen were at loggerheads; and, whether any of them were right or not, it may naturally be asked, What is the value of these opinions, if such minds, at such a crisis of their country's fate as occurred in 1861–1867, were driven to differ so greatly in their application?

But, independently of all contradictions which may be shown to exist in the various arguments, either in or out of Congress, supporting its legislation in reconstruction, they are all, politically, worthless. For they all, with the apparent exception perhaps of the conquest theory, pure

[1] Mr. Boutwell, in an oration, July 4, 1865, at Weymouth, Mass., published as a pamphlet with the title, Reconstruction and Its True Basis, p. 28, spoke of the doctrine of conquest as though it could be reconciled with the theory of a State-suicide.

[2] *Ante*, p. 115, note. I have been informed that Judge Parker and Judge Redfield were classed politically as Democrats. But, from their writings, I infer that they accepted some one of those views taken by the Story and Webster school, presented *ante*, pp. 100–102, under headings iii., iv., v.

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and simple, affirm the possibility of forfeiture, by the States, as political personalities, of rights and privileges held under the written Constitution as law. But this proposition, as a matter of doctrine, rests either on the notion that the Constitution can of and by itself operate as law, which is the *fetish* constitution, pure and simple,[1] or on the assumption that, as matter of political fact, a nation or people has been distinguishable from the States United; which nation, the nation by hypothesis, gave and had continued to give the force of law to that constitution, — an assumption which is contradicted by the history of the country[2] before 1861.

So far as I know of any reasonings supporting a doctrine of State-suicide which had been offered in or out of Congress, they are, with the single exception of Dr. Brownson's in "The American Republic," from which I have largely cited, liable to the same objection.[3]

This, I think, may appear particularly obvious in the resolutions offered by Mr. Sumner in the Senate, Feb. 11, 1862,[4] entitled "Resolutions declaratory of the relations

[1] *Ante*, p. 100.

[2] *Ante*, p. 118.

[3] An article contributed by me to the "American Law Review" for January, 1867, vol. i. pp. 1–25, entitled *Theories of Reconstruction*, presents an analysis of the different plans or methods offered at that time, as being all founded on the idea of enforcing such a law, with a brief statement of that solution of the question, which is here again supported as the true or actual one. In the conclusion of this article I had mentioned a series of letters in "The Nation," vol. i. Nos. 1, 18, 21, 23, 25, 26 (from July 6, to Dec. 28, 1866), by Mr. George P. Marsh, as sustaining the doctrine of State-suicide on a theory of national existence like that presented by Dr. Brownson. On further examination of these letters, however, I find that the writer had adopted the view of the Constitution derived from a hypothetical people or nation, and acting on the States as municipal corporations under law; his argument being substantially like Mr. Sumner's.

[4] Cong. Globe, 2d Sess. 37th Cong. p. 736; Macpherson's Hist. p. 322. The more brief and terse resolution offered in the Senate by Mr. Howe, of Wisconsin, Jan. 10, 1866, Cong. Globe, 1st Sess. 39th Cong. p. 162, is open to the same objection, speaking of "political functions formerly granted" to the people of these States.

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between the United States and the territory once occupied by certain States, and now usurped by pretended governments, without constitutional or legal right."

The preamble recited —

"Whereas certain States, rightfully belonging to the Union of the United States,[1] have, through their respective governments, wickedly undertaken to abjure all those duties by which their connection with the Union was maintained, to renounce all allegiance to the Constitution,[2] to levy war upon the national government, and, for the consummation of this treason, have unconstitutionally and unlawfully confederated together, with the declared purpose of putting an end to the supremacy of the Constitution within their respective limits, . . . and whereas the extensive territory thus usurped by these pretended governments and organized into a hostile confederation belongs to the United States as an inseparable part thereof, under the sanctions of the Constitution, to be held in trust for the inhabitants in the present and future generations, and is so completely interlinked with the Union[3] that it is forever dependent thereupon; and whereas the Constitution, which is the supreme law of the land, cannot be displaced in its rightful operation within this territory, but must forever continue the supreme law thereof, notwithstanding the doings of any pretended governments acting singly or in confederation in order to put an end to its supremacy, Therefore —

1. *Resolved*, that any vote of secession or other act, by which any State may undertake to put an end to the supremacy of the Constitution within its territory, is inoperative and void against the Constitution, and, when sustained by force, becomes a practical *abdication* by the State of all rights under the Constitution, while

[1] This suggests the inquiry, Is "the union of the United States" something different from the union of the States or from the United States?

[2] Allegiance is never due to a law. It can only be due to some person or persons. The position of a State in the Union with the other States had not been matter of duty; because the possession of sovereignty, either alone or with others, cannot be under law.

[3] If Mr. Sumner had ever defined what he meant by "the United States" and "the Union," or, perhaps, had himself had a definite conception on the subject, he might have framed resolutions which would have received more attention.

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the treason which it involves still further works an instant *forfeiture*[1] of all those functions and powers essential to the continued existence of the State as a body politic, so that from that time forward the territory falls under the exclusive jurisdiction of Congress, as other territory, and the State, being according to the language of the law *felo-de-se*, ceases to exist."[2]

If the question had been one which could have been considered from the lawyer's point of view, that is, as a question to be settled by a law, the strength of the argument would have been altogether with the so-called conservative doctrine, — the view taken by Judge Sprague, Judge Curtis, Judge Parker, by Mr. Johnson, and also, to some extent, by Mr. Lincoln.

But when the result of military operations allowed the general government, as the prevailing belligerent, to show by its action as a government,[3] that it had vindicated the power of a sovereign against rebellion, this view of the matter, as a question of law, disappeared of necessity. For the assumption on which it rested — that *the States* were the personalities under the law — was inconsistent with the idea of any treason in private individuals, or with any rebellion, in the ordinary sense; and, logically, it presented the alternative, — either the assertion of rights of conquest under the law of international warfare, or, if such a conquest were abandoned, the recognition of the eleven States at the end of the war, as standing in the same position as before 1861.[4]

[1] *Treasonable abdication* is contradiction in terms. A person who is in a situation to abdicate a right or power cannot be under an obligation to anybody to exercise that right or power. And, how can a person forfeit what he has already abdicated? Or what is abdication or forfeiture by "void" action?

[2] To make the parallel good, Mr. Sumner must have meant that the *fact* of death depends on the answer to the question of felony or no felony; to be given when inquest is held over the body.

[3] Compare the general proposition at the beginning of the first chapter.

[4] Mr. A. H. Stephens, the vice-president of the government organized by the Confederacy, was consistent in taking this position, saying in an address

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Other Views of State-suicide.

The method which I have followed, in looking to *the action of the government* as indicative of the political theory to be determined, does not require that I should refer to the reasoning of anyone, however distinguished for legal or political knowledge, either in or out of Congress, as authority for the support of any doctrine I may have arrived at independently.

But from various statements made by several well-known advocates of some doctrine of State-suicide,[1] I cite one passage as expressing a view the nearest to my own.

before the General Assembly of the State of Georgia, Feb. 22, 1866, "Another of our present duties is this: We should accept the issues of the war and abide by them in good faith. This, I feel fully persuaded, it is your purpose to do, as well as that of your constituents. The people of Georgia have in convention revoked and annulled her ordinance of 1861, which was intended to sever her from the compact of Union of 1787. The Constitution of the United States has been reordained as the organic law of our land. Whatever differences of opinion heretofore existed as to where our allegiance was due during the late state of things, none, for any practical purpose, can exist now. Whether Georgia, by the action of her convention in 1861, was ever rightfully out of the Union or not, there can be no question that she is now in, so far as depends upon her will and deed. The whole United States, therefore, is now without question our country, to be cherished and defended as such by all our hearts and by all our arms.

"The Constitution of the United States and the treaties and laws made in pursuance thereof are now acknowledged to be the paramount law in this whole country. Whoever, therefore, is true to these principles, as now recognized, is loyal, as far as that term has any legitimate use or force under our institutions. This is the only kind of loyalty and the only test of loyalty the Constitution itself requires. In any other view everything pertaining to restoration, so far as regards the great body of the people in at least eleven States of the Union, is making a promise to the ear to be broken to the hope. All, therefore, who accept the issue of war in good faith, and come up to the test required by the Constitution are now loyal, however they may heretofore have been."

[1] Mr. Sumner seems to have recoiled at times from accepting fully the consequences of his own propositions; as in the remarkable debate in the Senate, Dec. 19, 1866, on the admission of Nebraska, in which senators Wilson, of Massachusetts, Doolittle, of Wisconsin, Fessenden, of Maine, and Johnson, of Maryland, participated. "*Mr. Doolittle.* — He (Mr. Sumner) has insisted that the constitutional amendment could not be submitted to the States of the South, because he has always consistently maintained that there were no States there to submit it to. *Mr. Sumner.* — Not precisely. No State governments. *Mr. Doolittle.* — No legislatures. *Mr. Sumner.* — No valid legislatures." Cong. Globe, p. 192.

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Mr. Boutwell's Statement of State-suicide.

In a debate in the House of Representatives, Feb. 16, 1864, Mr. Boutwell said:[1] —

"If the gentleman ask me whether there be the right in this country[2] to prevent the people of Arkansas going out of the Union? I say, Yes: but if he asks me whether there be any constitutional power by which we can prevent the people of Arkansas from declaring that their State organization has ceased to exist? I say, No. That is a matter within their own control, as a fact; and you cannot escape from a fact, whatever your reasons and theories may be. By the voice of the people of Arkansas, their State organization has ceased to exist.[3] What remains? The jurisdiction of the general government under the Constitution over the territory of Arkansas exists unimpaired, exactly as it was before this so-called ordinance of secession was passed! What more remains? Jurisdiction and sovereignty over the people of the State of Arkansas, neither more nor less than it was before the act of secession was passed.[4] What is the condition of the people? Speaking legally and also as a matter of fact,[5] they have just those rights which they can enjoy without a State organization. Of what are they deprived? Of those privileges under the Constitution which can be enjoyed only through a State organization."[6]

[1] Cong. Globe, 1st Sess. 38th Cong. p. 688.

[2] The answer to the question, what "this country" had a right to do, depends on the question what "this country" then was.

[3] Their voice had declared only the intention that the State should no longer be one of the United States. Mr. Boutwell had not shown how this was "declaring that their State organization had ceased to exist."

[4] This is a material inconsistency. To say that the State ceased to be a State and became a territory of the United States, is to say that the persons possessing jurisdiction and sovereignty have been changed. The sovereignty itself is indeed neither more nor less, and it was always vested in the States *united*. But the jurisdiction of the general government over the territory was entirely changed, becoming exclusive.

[5] It is speaking *politically*, that is, about a fact, and therefore not "speaking legally."

[6] This shows that Mr. Boutwell regarded the termination of State existence as following, by operation of law, on "the declaration" of the people of Arkansas; as if the organization of a State was like that of a municipal corporation under a charter. In my view, the "privileges" of a State were not "under" the Constitution at all. If the "privileges" of the States in union did not pre-exist, there was nothing to make the Constitution law for anybody.

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Theory of Ideas acting as Law.

It will be observed that I have not accepted any argument which may be detected in the propositions here cited from Mr. Sumner's and Mr. Boutwell's remarks; and to avoid as much as possible the liability to be misunderstood, I desire to point out how entirely distinct the political conclusion as to State-lapse, which is founded on the original investiture of sovereignty in States united, is from any founded on *ideas* of political justice, assumed to have the force of law independently of all connection with the known will of a visible possessor of sovereign power.[1]

The State-suicide argument, as it has been commonly presented, was dependent on the assumption not only that the Constitution was a law acting on the States, but that, as law, it comprehended those *ideas* of right and wrong which those who supported that conclusion approved, as private individuals.[2] It was on account of the motive to

[1] "They who orginate and enforce ideas decide in a large measure what the government shall be and what it shall do, although the work of governing is usually in the hands of others. But it is not wise to deny the force of ideas, and it is the necessity and duty of the statesman to accept and reject ideas in preparing himself generally, and in special cases often, for the duties of his position. . . . The idea of liberty and equality, to which Mr. Lincoln was pledged, demanded the immediate and unconditional emancipation of all the slaves in the United States. . . . As the waste and horrors of war increased, the number of those who thought that States could engage in an attempt to overthrow the Constitution, without losing any of their rights under it, gradually diminished. Finally, the idea in its fulness could be accepted and enforced." — North Am. Rev., Dec. 1879, p. 543, article "Young Men in Politics," by Mr. G. S. Boutwell.

[2] This assumption was equally acceptable to some who based the reconstruction legislation on the guaranty clause. (*Ante*, p. 260.) It has been commonly attempted to veil its purely arbitrary character under another equally arbitrary assumption; that is, that the words of the Declaration of the Independence of the colonies are not to be read as the proclamation of a political purpose merely, but as having the force of a statute law or bill of rights, and that the introductory propositions are to be taken as the legal foundation for all private relations, to be received by the States as if they held their existence under some law contained in the same document. For illustration see Senator Howe's speech on his resolution of Jan. 10, 1866; Wilson's Hist. pp. 25, 36; Cong. Globe, 1st Sess. 39th Cong. p. 163. Also, the citation from Mr. J. R. Lowell, *ante*, p. 271.

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support slavery that the action of the Southern States was censurable, or at least wicked enough to draw down extinction of political existence. This, in fact, was the basis of Mr. Sumner's and Mr. Boutwell's argument for their coroner's verdict of State-suicide.

The political consequences of a clearly expressed intent on the part of the people of a State to separate from the other States, as I have presented them, follow without reference to the moral character of the considerations inducing the political act. Whether some States are necessarily superior to others in the faculty of conceiving moral ideas is immaterial. None can claim an exemption from the conditions of their political existence. The consequences of attempting separation follow, when the purpose of the State is to sustain human rights and republican forms of government, as when it is to sustain slavery and anti-republican institutions; whatever may be the standard of human rights and of republican government.[1]

The inconsistencies in each of the different views offered on the reconstruction question were fully enough exposed, at the time of their discussion, by opponents severally advocating positions equally inconsistent.

But to cover up these contradictions, or speaking more charitably and perhaps also more truthfully, to hide them from their own consciousness, those who succeeded in leading the policy of Congress at this crisis resorted to fictions like those called "legal fictions" in the common law.

Of these the principal one was that these ten States had, by their own act, without any external coercion as of a

[1] Judge Parker, in the lecture on Revolution and Reconstruction (*ante*, p. 260, n.), p. 20, says: "We may here see the utter folly of the position that a State, attempting to secede, thereby becomes *felo-de-se* and a territory. Suppose Massachusetts had withdrawn from the Confederation, into what condition would she have fallen territorially? This is a fair test." Perhaps Mr. Sumner would have made a distinction. But I should say that what was sauce for South Carolina would be sauce for Massachusetts.

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Effect of not taking the Oath to support the Constitution.

conqueror, though without any intention on their parts, deprived themselves of their own governments; that is, of those governments which are State governments because the States, or the political people of those States, have instituted them or caused them to exist.

It may be conjectured that many persons have regarded this as a legal consequence from the provision in Article VI. of the Constitution: "The members of the several State legislatures and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution."

It may be argued that, unless the persons who may assume the functions of the State governments do actually so bind themselves by oath or affirmation, they will not be invested with those functions; so that, if all so omit to do this, there will be nobody to be a government.[1] In point of law, the State officials are none the less bound to support the Constitution, though omitting to take such oath or affirmation. The obligations of the citizen to respect and obey the laws are not dependent on his own choice. But, admitting the conclusion against the existence of a State government, the question is, What *political* power or duty devolves upon the general government in the premises?

It would be contradictory action on the part of such persons, so assuming the functions of a State government without regarding this provision, to undertake to join in the election of a President of the United States, or to send senators and representatives to Congress. But supposing that this should be attempted, it is clear that it would be for Congress, in judging of the qualifications of its several members, on legal proof of the facts, to reject the claim of such persons. Again, if the acts of such persons assuming State functions within the State are made the foundation

[1] As in Mr. C. G. Loring's pamphlet on Reconstruction, p. 33.

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of legal claim to rights and obligations, they would, on legal proof of the facts, be regarded as null in courts of the United States.

But whether any political action can be taken in the case by any department of the general government is a matter for which no provision is found in the Constitution, as law. If "the political department," whatever that may be, can take any coercive measures in the premises, it must be on the foundation of a State-lapse,[1] either as herein maintained or on some other ground.

Von Holst, in his work on the American Constitution, vol. i., p. 15, quotes some German, saying, "Wo die Begriffe fehlen, da stellt zu rechter Zeit ein Wort sich ein," which may be translated, "Where definite conceptions are wanting, there, a *word* opportunely introduced may supply the place." At the close of the war, none of those whose fortune it was to direct the action of the government had any definite conception of the actual person holding that sovereign power which had just been vindicated against a rebellion; and so, *words*, like "disorganized States," "States deprived of their governments," "States out of their practical relations to the government," stepped in and carried the day.

The political transaction indicated in these phrases was supposed to have occurred at the very time when the functions of the State governments had, as a fact, continued to be exercised, and that too with a strong hand, during the war, and when the parties exercising such functions as the State governments had been recognized as belligerents by the government of the United States, and, for a long period, and even to the very date of this congressional reconstruction, had been invited to ratify, as if by their free consent, two articles of amendment to the Constitution of the

[1] This appears to have been Senator Howe's position in remarks supporting his resolution offered Jan. 10, 1866. Cong. Globe, 1st Sess. 39th Cong. p. 164.

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United States, and while the Supreme Court was daily sustaining the action of such governments in their several departments as the foundation of legal relations.[1]

The only basis for the actual reconstruction measures of Congress being either the theory of conquest or of State-lapse, those measures were an assertion that, within the limits of the ten States of the former Confederacy, there was no political people participating in that sovereignty which, as a unit, is held by the United States, as recognized by other nations, and which gave to the written Constitution the authority of law within those ten States, as within every portion of the national domain.

As a consequence, no one of these States had the capacity to *adopt* an amendment to the Constitution, as a State to be counted in estimating the requisite three fourths. Those adopted since the close of the war were in fact adopted by the authority of the States choosing to continue in that Union in which only they had had independent political existence.

The ten States were literally to be reconstructed; or, more pointedly, new States were to be constructed in their places, which could come into being only as the majority of the individuals composing each new political people should accept the amendments as part of an existing constitution; as do the political people of a Territory which has never been known as a State.

The question presented by the circumstances of that time, being outside the domain of *all law*, was of necessity outside the domain of the Constitution, as law; and therefore it was a question which could not be settled by the Supreme Court.[2]

[1] *Ante*, p. 7.

[2] This was also the proper answer to the suggestion made by Senator Doolittle, of Wisconsin, and others, Dec. 12, 1865, when the joint committee on these matters was first proposed, that the question of reconstruction should be referred to the judiciary committee. Wilson's Hist. p. 18. Cong. Globe, 1st Sess. 39th Cong. p. 25.

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During the discussion in the Senate of those clauses of the fifth section of the Act of March 2, 1867, which related to the adoption of the fourteenth article of amendments by the States named in the bill, Feb. 15, 1867, Mr. Sumner proposed to designate plainly that the article would be in force when adopted by the proper proportion of the States then represented in Congress; that is, excluding the ten States from the whole number. Cong. Globe, p. 1393.

On this point Mr. Reverdy Johnson remarked, "When will the Constitution be amended by the ratification of three fourths of the States that are represented? Who is to decide that? That is an open question, and must be an open question just as much after you have declared that it is to be a part of the Constitution when ratified by three fourths as if you leave it blank. If, in point of law,[1] the States that are now represented are the States to whom is to be referred, and by whom is to be ratified, the constitutional amendment proposed by Congress, then the Constitution of the United States will be altered in that respect; but if it is to be submitted to more than the States that are represented in Congress, that is to say, to all the States, the question will be open whether Congress declares it or not, and that is a question of constitutional law which Congress cannot decide by any declaration. It may go for what it is worth, that in the opinion of Congress (if that should be the action of Congress), the Constitution may be amended by the ratification of three fourths of the represented States; but whenever the question arises before the judiciary it will be governed by other considerations. It must be governed by what is the meaning of the

[1] The question, What are the States of the Union, and what are not? must always have been of the same nature, at the first day that there were United States, as at any time afterward. If the Supreme Court could determine, at any time after 1861, how many States composed the Union, as matter of law, it might have decided at the beginning whether there were thirteen or a greater or a less number.

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Constitution in that particular, and be governed by what the courts shall decide is the condition of the States that are not represented. If the courts shall be of opinion that the States which are not represented in Congress, are still States, then they will certainly decide that a ratification by three fourths only of the States that are represented will not make a change in the Constitution." Cong. Globe, p. 1393.[1]

The possession of sovereignty can only be known by its successful assertion. Anybody may, in words or by force, dispute any such assertion, taking the risk of being dealt with as a traitor under a law resting on that successful assertion. Courts of law must of necessity profess to carry out the will of some one or more persons who have, as matter of fact, successfully asserted the possession of sovereignty over certain territory.

The question in this instance is, Whom does the Supreme Court recognize as the persons who, having asserted that they held or exercised sovereign power in the domain known to the world as that of the United States, *proved* it by actually exercising it?

Will the Court recognize among those who succeeded in their assertion of the possession of sovereign power in the domain of the United States any who said of themselves that they were not among those States?

The principal defect in the actual reconstruction measures has been that the political truth which sustains the action of Congress has been obscured by its legislative language; when it might have been manifested, both by word and action, by instituting territorial governments in the places of these ten States, or by organizing and admitting a new State out of contiguous portions of those former

[1] These remarks, by one of the ablest lawyers in the country, afford another illustration of the fatal defect of looking at the political question from the lawyer's point of view.

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States, to be a visible memorial of the political fact on which the Constitution had always, as law, rested, — that, except in *voluntary* union with the other States, there is no such thing as a State of the United States.[1]

But it is the fact of to-day which concerns us of to-day. The question of allegiance is always one of existing fact, not of past fact. History, even the history of the war closed in 1865, is of no importance in this respect except as it is identified with to-day's life. It is not a question of theory, doctrine, or natural right. He, she, or they, whom the inhabitants of a country do to-day regard as their sovereign, *is* or *are* their sovereign. The historical question, Whom did they so regard yesterday? is material only as yesterday and to-day are one epoch: and, in this light, history generally seems to give the answer.

Whatever may be the truth as to the facts of a century ago, it is not of the slightest importance as compared with testimony on the question of present fact, — Where do the inhabitants of this country *to-day* find the *majestas legibus soluta*, their ultimate sovereign, whose right of dominion may call them personally to hazard their lives and fortunes in war against all who would resist it?

I have not in these pages proposed a *theory*[2] to settle what can only be a question of fact.

If the Southern States continued throughout the war to be, politically, what they had been, and, as such, were the parties belligerent against the government as representing

[1] As was done, in part, by forming West Virginia as a State. Dr. Brownson, in denying the power of Congress to deal so with the territory and population (Am. Republic, 817–819), is, I think, inconsistent with his own doctrine of State-lapse. It would appear that some members of Congress would have approved of instituting territorial governments, but for their distrust of the President's exercise of the appointing power, as Mr. Lawrence, of Ohio. Cong. Globe, 2d Sess. 39th Cong. p. 1083. But, if one branch of the government has exceeded its powers because it distrusted a co-ordinate branch, all that can be said is that the Constitution has proved a failure.

[2] Compare *ante*, p. 98.

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another belligerent; or, which is the same, — and for the present question even more material, — if the general public, North as well as South, and those who in public station represent the political people of all the States, North as well as South, say that it was so, and that the eleven States were, as such, defeated on "wager of battle," as one belligerent in a war between Russia and Turkey, or France and Germany, may be defeated by the other, and that they are still united with the other States because so defeated, — then the capacity on the part of each State to compel the obedience of its citizens in supporting a secession has, as a political fact, been established.

But this capacity on the part of a State makes the attempted secession the exercise of a right which can only be controverted as a sovereign right; which is nothing else than "the right of peaceable secession" ("peaceable," — that is, as any sovereign right is peaceable; except as contested by international war), which was demanded by the Southern doctrine of State sovereignty:[1] and so the doctrine of secession, as the affirmation of the political right, has been established, while the exercise of the right has, as a political fact, been successfully resisted.

But if this was the true state of the case at the end of the war, the practical question still arises, Is the political Constitution of the country the same *to-day?*

[1] *Ante*, p. 88.

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CHAPTER VII.

POPULAR DISLIKE OF ABSTRACT CONCEPTIONS. — THEIR NECESSITY IN POLITICAL DISCUSSION. — THE INDIVISIBILITY OF SOVEREIGNTY. — THE SOVEREIGNTY OF THE POLITICAL PEOPLE DISTINGUISHED FROM POPULAR SOVEREIGNTY. — QUESTION OF A REVOLUTIONARY CHANGE FOUNDED ON POPULAR SOVEREIGNTY. — OF THE POSITION OF THE JUDICIARY IN REFERENCE TO SUCH QUESTION.

ON the 11th of April, after the evacuation of Petersburg and Richmond and the surrender of the Army of Northern Virginia, Mr. Lincoln received, informally, a number of citizens before the presidential mansion, and addressed to his visitors some remarks, the last public expression of his views,[1] commencing, "We meet this evening, not in sorrow but in gladness of heart."

The principal subject of the address was "the re-inauguration of the national authority; reconstruction;" particularly as a question presented at that moment by the political condition of Louisiana.

In the course of this address, Mr. Lincoln said: —

"I have been shown a letter on this subject, supposed to be an able one,[2] in which the writer expresses regret that my mind has not seemed to be definitely fixed on the question whether the seceded States, so-called, are in the Union or out of it. It would, perhaps, add astonishment to his regret were he to learn that, since I have found professed Union men endeavoring to make that question, I have *purposely* forborne any public expression upon it. As appears to me, that question has not been, nor yet is a practically material one, and that any discussion of it, while it thus remains practically immaterial, could have no effect other than the mis-

[1] Mr. Lincoln's assassination was on the 14th of the same month.

[2] I have not been able to learn anything respecting the letter referred to.

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chievous one of dividing our friends. As yet, whatever it may hereafter become, that question is bad as the basis of a controversy, and good for nothing at all, — a merely pernicious abstraction. We all agree that the seceded States, so-called, are out of their proper practical relation with the Union, and that the sole object of the Government, civil and military, in regard to those States, is to get them into that proper practical relation. I believe it is not only possible, but in fact easier to do this without deciding, or even considering, whether these States have ever been out of the Union, than with[1] it. Finding themselves safely at home, it would be utterly immaterial whether they had ever been abroad. Let us all join in doing the acts necessary to restoring the proper practical relations between these States and the Union, and each forever after innocently indulge his own opinion whether, in doing the acts, he brought the States from without into the Union, or only gave them proper assistance, they never having been out of it." [2]

It was shown by Mr. Lincoln's language on this and on other occasions[3] that he had accepted the continued existence of the compromised States, and seemed to have assumed that it was competent for the executive to negotiate for the restoration of their "proper practical relations," taking the "loyal" inhabitants of each as corporately possessed of the functions and capacities of the State.[4]

But a question of his power to undertake this would be suggested either by the conservative view, by which they were spoken of as *in*, or by the State-suicide view, by which they were spoken of as *out*. It was, apparently, in this effect that the "question" presented itself to his mind as "pernicious."

Whether the term "pernicious abstraction" was original

[1] *Sic*, but probably should be "within."

[2] Macpherson's Pol. Hist., p. 609.

[3] See Message, Dec. 8, 1863. *Ante*, pp. 35, 36.

[4] It is very likely that both Mr. Lincoln and Mr. Johnson had a general notion that the diplomatic functions of the Government, as exercised by the executive in intercourse with foreign nations, would be the proper machinery for the prospective transaction of restoring the eleven States to their "proper practical relations between themselves and the Union," whatever that might be.

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or not with Mr. Lincoln, it seems to have been a taking one, judging from its repetition by others.

At a later period, when a majority in Congress were about to assume the control of the same subject, on a basis nominally similar to that accepted by Mr. Lincoln and by Mr. Johnson, that is, that these States were deprived of civil government, it was the legislature which treated the same "question" with contempt. The majority of the Committee on Reconstruction did "not deem it necessary or proper to discuss the question whether the Confederate States are still States of this Union or can ever be otherwise. Granting (they say) this profitless abstraction, about which so many words have been wasted," etc.[1]

Considering that the theories of conquest and of State-suicide are, apparently, insisted upon in almost alternate sentences in the same report, the committee's idea of wasting words over abstractions seems somewhat obscure.[2] But the conclusion intended evidently was that any affirmation of State existence or non-existence, which would remove the subject from its exclusive jurisdiction, was as "profitless" for Congress as any could have been "pernicious" which obstructed Mr. Lincoln's efforts.[3]

[1] *Ante*, p. 48 [*d*]. The minority of the committee, in their report, very naturally took issue as to this expression, saying, "In our judgment, so far from this being a 'profitless abstraction,' it is a vital inquiry."

[2] *Ante*, pp. 42-47.

[3] In the essay already mentioned (*ante*, p. 260), Mr. C. G. Loring says (p. 88), "The issue whether the States were to be accounted as in or out of the Union, — the question in that form is something worse than a mere profitless abstraction; it is a pernicious play upon words." Mr. J. R. Lowell, in the North American Review for April, 1866 (*ante*, p. 260), says (p. 540), "It seems to us the idlest of all possible abstractions now to discuss the question whether the rebellious States were ever out of the Union or not, as if that settled the right of secession." Mr. Wilson, in his History of Reconstruction, p. 115, states, "I have said that time was wasted in disputing whether these States were in or out of the Union." This language is more remarkable from a senator who, at one time at least, said that amendments to the Constitution might be adopted without counting the ten States. (*Ante*, p. 260.) Mr. Thaddeus Stevens's remarks, cited *ante*, p. 227, n., indicate a

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It may be thought, however, that the Supreme Court has not equally slighted the question; having, in the leading cases herein cited, so positively affirmed that the compromised States were always States in the Union.[1] But what it is to be a State of the Union in view of what had transpired, the Court has very partially defined. It may have declared that these States are to be deemed to have existed, so far as the relations of civil life are concerned; but what it is to be in the Union politically, it has left to be settled by a "political department," which, whether executive or legislative, has pronounced the question an "abstraction," either "pernicious" or "profitless."

It may be that in so accepting the action of "the political department" the Court intended to recognize the reconstruction legislation of Congress as the execution of the guaranty of a republican form of government *to a State*.[2] But if the action of Congress in this instance has not been distinguished from its action in organizing a State from a Territory, the question whether the eleven States had continued States of the Union has been ignored by the judiciary, accepting the transaction without an attempt at explanation or justification, as completely as it was ignored by the executive and legislative departments.

Aside from all estimates of the correctness of any view on this subject which Mr. Lincoln may have taken, his use, in this connection, of the word "abstraction" illustrates his political sagacity, at least; or rather, perhaps, his unconscious sympathy with popular methods of thinking on political matters. But, if this is the case, it at the same time betrays one of the most constant hindrances in all discussion of American political questions. *Abstractions*

similar indifference to the question, equalled, however, by that shown by Mr. Alexander H. Stephens, when taking a somewhat different view of the situation. (*Ante*, p. 280.)

[1] *Ante*, pp. 12, 21, 25.

[2] *Ante*, pp. 14, 80, 236, 249.

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are more *practically* in use with us than with any other political community.[1] More words correspondent to abstract ideas are required for our political discussions than for those of any other political society. It is mainly owing to our unwillingness to recognize this, and to demand a definite use of words adequate to distinguish our various political conceptions, that phrases of vague and doubtful meaning are so copiously employed in public discussions.

The words, "the country," "the nation," "the people," "the State," "the Union," "the Constitution," "the Government," "sovereignty," "subject," "allegiance," "loyalty," "law," "right," "freedom," "slavery," are each required to express abstract ideas. But to call a *question* an abstraction — meaning, as far as that can mean anything, that it is a question involving definite conceptions of abstract ideas — is quite enough to bar all effort to reconcile action with principle, and to give a clearer field for any measures supposed to be "practical," because the abstract ideas involved have been arbitrarily pushed out of view.[2]

In connection with American constitutional law, the indivisibility of sovereign power has heretofore been asserted mostly by those who maintained the Southern or States-rights view; while the divisibility of such power, so far

[1] Camp's Democracy, Ch. III. It is when describing the nature of the American Union that De Tocqueville (Democracy in America, I., 200) says, "The human understanding more easily invents new things than new words, and we are hence constrained to employ many improper and inadequate expressions." The difficulty, in general, is the subject of Sir George Cornewall Lewis's work on The Methods of Observation and Reasoning in Politics, Ch. IV.

[2] In the debate on the 8th February, 1867, in the House (*ante*, p. 230), Mr. Thayer said, "Without regard to any question of political casuistry turning upon the question of States in the Union and States out of the Union, one thing let gentlemen depend upon, — that the people, who do not understand these fine-spun metaphysical distinctions, will and do insist," etc.

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Citation from an earlier Work.

as asserted at all, has been maintained by writers of the opposite school.[1]

In the first volume, published in 1858, of a work connected with constitutional law as affecting legal cases arising out of the existence of negro slavery in a portion of the States, I had traced the distribution of sovereign powers, as exhibited in the political history of the country from the colonial era to the time of the adoption of the Constitution.[2]

As the conclusion from that historical review, I had stated[3]: —

"If the language of the Constitution does not base its authority upon or recognize any other theory, and if, for aught that appears from it independent of theory, it may be merely declaratory or constituting, not granting, giving, or conveying (except in the institution of a subordinate government), and if the facts which led to the actual customary recognition of the written Constitution do not contradict the view, it may be justly regarded as the necessary and only doctrine of *law*, under the instrument, that the powers assigned by it to the Government of the United States are equally original and sovereign in the hands of a political unity called the people of the United States, as the sovereign powers, not so granted and not prohibited to the several States, are original in the possession of the people of the several States; that is, the Constitution, as a political fact, is evidence of the investiture of certain sovereign national powers in the united people of the States, antecedent to the Constitution, as well as of the residue of sovereignty in the same people in their several condition of the people of distinct States.[4] It being here taken as a principle, independent of the Constitution, that sovereignty is not necessarily, in theory or practically, concentrated in one locality, its place being determined, as any other fact, by historical evidence."

[1] *Ante*, p. 106, n. 3.

[2] Law of Freedom and Bondage, §§ 231–235, §§ 330–346, of which the summary of the facts, which has been given in Ch. IV. of this essay, is an abridgment. (*Ante*, pp. 128–135.)

[3] *Ib.* § 346.

[4] Compare *ante*, p. 103, VI.

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The first lines of the passage cited illustrate the liability to an error of expression, arising from the habitual intrusion into our political thought of that misconception which consists in regarding the possession of sovereign power as a right which can be determined by law; or in imagining that, in this country at least, sovereign powers are held under the written Constitution as law. The truth is that, as the possession of sovereign power is only matter of fact, or that which is shown by history, the Constitution, as historical political fact, can only be evidence of the exercise of such power; and the possession of sovereign powers should not here have been spoken of as "doctrine of *law* under the instrument."

But it is more especially in reference to the *indivisibility* of sovereignty, as a general principle, that I have here cited my own earlier statement of the doctrine of its *divisibility*, in concluding which I had observed that "the place" of sovereignty is "determined, as any other fact, by historical evidence."

It may not so appear to others, but to me it seems that, during the twenty-two years which have elapsed since writing the passage above given, some very material "historical evidence" has been presented on this precise question.

The old writers distinguished the *forma regiminis* from the *forma imperii*. The powers of sovereignty have been exercised *in distribution* on this continent from the days of the first colonies, — *distributed*, that is, in exercise, between an imperial and the colonial governments; and afterwards between a general or national or federal government and the State governments. Such has been the *forma regiminis*.

Had there been no attempt to separate, it might have seemed that the sovereignty was actually divided by the *forma imperii:* part held, as fact above law, by the people

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of the States, as one; and part by the people of the States, severally. To me, it seems that a case like Keith *v.* Clark is a crucial experiment. The powers held by the States severally cannot, under any theory of the Constitution, be sovereign in any sense when the use made of them by the State governments is subject to the judgment of any department of another government holding the other powers of sovereignty. If the power to establish a bank belonged to a State before the rebellion[1] and continued to belong afterwards, it seems inconsistent to suppose another party having a right to ask about the use made of the bank-notes. Powers held by one, over territory and inhabitants, cannot be sovereign if they may not be exercised without reference to other powers held by another over the same territory and inhabitants.

On the invitation of the New York Society for the Advancement of Science and Art, Mr. George T. Curtis, well known as the author of the "History of the Constitution of the United States" and other publications on kindred subjects, delivered, March 8, 1875, "A Discourse on the Nature of the American Union, as the Principal Controversy involved in the Late Civil War." This discourse was repeated in Philadelphia, April 26, of the same year, and was afterwards printed.[2] This discourse, etc., is, so far as I know, the only publication which has appeared attempting to give a formal statement of the political facts supposed to have been in question and to have been settled by the war.

Independently of the general interest of this contribution to political literature, I find it particularly important as designating the point or question which I agree with

[1] The power to establish a State bank was not one of the powers "usurped" from the general Government by the government of Tennessee, according to that part of Mr. Justice Bradley's opinion, which is cited *ante*, p. 81, because it was one of the "reserved" powers.

[2] Pp. 35. Dutton & Co., 713 Broadway, New York.

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the author in regarding as the fundamental one in our American constitutional law, while I entirely disagree with him as to the matter of fact asserted.

On page 6 of this discourse, Mr. Curtis has said, "Now, there can be no question, it seems to me, that the statesmen of all sections who made the Constitution understood this, — that political sovereignty, or government, is capable of division; according to subjects and powers; and that while the people of each State, after the Revolution, had a perfect and absolute right of independent self-government, it was both theoretically and practically possible to transfer to a common depositary certain of their political powers for specific purposes, while they reserved all their other[1] powers to themselves."

As long as the question was of the interpretation of the written Constitution, as of any legal document, it has been material to know the sense in which the words and clauses were understood by those who drew it up or who signed it or who advocated its adoption.[2] It was for this that Story,

[1] In his History of the Origin, etc., of the Constitution of the United States, Vol. I., p. 206, Mr. Curtis had said, "Political sovereignty is capable of partition according to the character of its subjects." See also *ante*, p. 106, notes.

In Discourse, &c., p. 9, n., Mr. Curtis adds, "I have said in the text that the framers of our Constitution reached the conclusion that political sovereignty is divisible; and I regard this central truth, which, in the sense in which it is to be understood, is an American discovery, as the key to all correct interpretation of our political system." Mr. Curtis's note of reference is "Madison's works, IV., 390–391. Compare the Federalist, Nos. 39–45." In his History of the Constitution, II., p. 88, Mr. Curtis says,—"to regard the people of each State as competent to withdraw from their local governments such portions of their political power as they might see fit to bestow upon a national government. The latter plan was undoubtedly a novelty in political science; for no system of government had yet been constructed in which the individual stood in the relation of subject to two distinct sovereignties, each possessed of a distinct sphere, and each supreme in its own sphere."

[2] Those "statesmen of all sections who *made* the Constitution," as Mr. Curtis has it.

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Kent and other commentators cited the recorded opinions of Madison and other statesmen of the time.

But when the question has been — From whom does this Constitution derive its authority as law for us who live *to-day?* — it is not of the slightest consequence what Mr. Madison or any or all the framers, signers and advocates hoped, wished to be, or expected would be the effect or operation of the Constitution. *We* want to find out the actual living persons who say *to-day*, We will this Constitution to be law; *sic volo, sic jubeo, stet pro ratione, voluntas.* If we can find out whom Mr. Madison, or "the framers," or their neighbors, friends, and acquaintances, or anybody else then living, being an inhabitant, or a denizen, or a foreigner, then, in their day and time, looked upon as this person, for themselves, that will be material evidence for us. Because we may suppose that, unless a revolution has occurred in the interval, the will we are now seeking has continued.

The question, Who and where is that superior whose measure of justice I must obey as law, or bear the penalty of transgression, and to whom I must be loyal and faithful in peace and war, or incur the penalty of treason? — that question — to which, if there be no answer, there can be no loyalty, no patriotism, no devotion to country; because, it being unanswered, there is no country — is one which may or may not be answerable by the American of to-day.

The question relates to obligation, to duty, in political relations. It might be called a question of political morality, or of that which, in political knowledge, is analogous to morality in the sphere of religious knowledge, being predicated on the inevitable conditions of all political existence, the relation of sovereign and subject existing by necessity, whether the state be radical democracy or absolute monarchic despotism.

As, in the province of religious ideas, we distinguish

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knowledge of morality from theology, so in the province of political thought we might discriminate political morality from dogmatic politics or political theology, if the expression may be allowed.

The leading men of 1776–1787, the so-called "founders" of the republic, in common with some of the most brilliant minds of their century, gloried in their dogmatic politics, — bequeathing them to those who should come after them, in their writings, and notably in *The Declaration* — dogmas of political theology, doctrinal politics, about equality of men at creation; natural rights; governments resting on the consent of those *obliged* to obey them, — "generalities," which, as either true or false, are equally applicable or inapplicable at all times and in all countries: propositions about the meaning of which and the practical statecraft to be based upon it, we have been disputing from that time to the present hour, when inferences are drawn from their "self-evident truths" which would have filled those most respectable and conservative persons with horror and dismay.

That *something* was born July 4, 1776, which may have continued to the present, is undeniable. But whether it was one or thirteen, the fathers left to be settled by the children. What the real thing born on that memorable day was; who that was, or who those were who, on that day, were declared "free and independent States"; what that Our Country was, which then was born and for which, as they could, he should "pledge life, fortune, and sacred honor," was not told, for the American of to-day, by his predecessors of a century ago, for they did not tell it for themselves.[1]

[1] Brownson, Am. Rep., 242. "But the philosophy, the theory of government, the understanding of the framers of the Constitution, must be considered, if the expression will be allowed, as *obiter dicta*, and be judged on their merits. What binds is the thing done, not the theory on which it was done, or on which the actors explained their work, either to themselves or to

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For the "venerable founders" believed, or, rather, imagined that they believed, that they had got rid of the relation of sovereign and subject for themselves and for us; that abstract justice was quite enough to serve all their political uses and ours, and that the eternal antagonisms, *law* and *consent*, were thereafter to form a state to be like a perpetual-motion machine, going on forever, without expenditure of force, without the effort of personal will supported by force; and that writing, fairly engrossed on parchment, tagged with a lump of seal-wax, and called "The Constitution," would govern, in spite of their wills, those by whose wills it was to continue as law.[1]

But Mr. Curtis has himself said in this discourse (p. 10), that "the framers could not know whether the general Government would be the agent of the States, or whether the grant would be considered as proceeding from the people of the United States as a whole, or from the people of each separate State, or from the States as sovereign." And he goes on to show that their own doubts on this subject led to the difficulties of 1798–99, about the Alien and Sedition laws. If so, why appeal to the framers *now?*

If we recognize this utter ignorance on the part of the people then living, as to the persons from whom the Constitution could derive its authority, and yet hold that there is *now* a theory which had become so true before 1861 that it required only a huge civil war to manifest it, by ending in favor of the Government, we must attribute to the written Constitution itself the faculty of determining who were its

others. Their political philosophy, or their political theory, may sometimes affect the phraseology they adopt, but forms no rule for interpreting their work. Their work was inspired by and accords with the historical facts in the case, and is authorized and explained by them."

[1] See, for illustration, the opinions of the several justices of the Supreme Court, Chief Justice Jay, Justices Iredell, Wilson, Blair, and Cushing in Chisholm *v.* Georgia, 2 Dallas, 419 (1793), especially those of Judge Wilson and the chief justice, as a specimen of what was then, at least, held eloquence and sound political philosophy.

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progenitors, the faculty of making a nation or people, and compelling States to be States by its own inherent though long-hidden force, — the fetish Constitution!

Mr. Curtis told his audience that this idea of the divisibility of the right to govern, according to the subjects or objects of government, lies at the basis of our mixed political system, and it is what has always made that system so difficult to be understood by intelligent foreigners.

"It was nearly impossible," says Mr. Curtis (p. 7), "for many Englishmen to understand the legal and constitutional theory which gave the Federal Government a moral and constitutional right to resist the secession of States from the Union."

Of the answer which Mr. Curtis tells us he gave, he says, "This answer, of course, proceeded upon the assumption that such *is* our American constitutional law; that such *is* the true theory of our Constitution. But this was the great point of the debate, that came, after all other modes of debate had been exhausted, to be referred to the arbitrament of battle." [1]

Such statements of our position might suggest to foreigners the inquiry, If the Americans themselves could not know, until they had fought it out, what their own Constitution was, was it not expecting a good deal to demand of strangers, in 1861, that they should understand it in advance?

Mr. Curtis himself justly observes: "All that I have to say, in closing this digression, before I return to the historical development of this very important question, is that, considering its history and its peculiar character, it is not very wonderful that Englishmen should for a time have given their sympathies to our Southern brethren. We must learn to judge of the conduct of nations and individuals from the point of view at which they stand, and

[1] Compare *ante*, p. 89, n. 2.

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must appreciate our own case when we call upon them to understand it and to act accordingly."

Mr. Curtis also admits (p. 28), "It might seem, in the abstract, somewhat paradoxical to suppose that such a question [of the right of State secession as a constitutional right] could be definitely settled by fighting."

It might not be very difficult for English lawyers to conceive of distribution of the powers of government, as between the State governments and a general or federal government, while the States continued in undisturbed peace and voluntary union; for this distribution has been exemplified in all the colonial system of the British Empire. But when the proposition is, that, while at war with that general or federal Government, the principle of division of sovereignty as between them and that Government still obtained, it may be difficult for strangers to see why the States were not "in rightful possession of all their pristine autonomy and authority as States,"[1] unless they became subjects of conquest.

Indeed, the whole civilized world which accepts the definitions of the long-settled *jus gentium* and the modern *jus inter gentes* cannot avoid saying, You do state a paradox. Your own terms are a contradiction. If you settled any right by fighting, it could only have been a *treaty right*, — a right which, so far as it existed, rested only on the obligations of international law. It could not have been a right, as you now claim, under constitutional law.[2]

[1] The words of Mr. Justice Bradley, in Keith *v.* Clarke, *ante*, p. 81.

[2] In this connection a foreign critic might also ask, How does it happen, now that the fighting is all done, that we see in your law-libraries a volume of decisions (*ante*, p. 85, n. 3) by the chief justice of your Supreme Court, during part of the war and after it, edited by a prominent lawyer in one of the States of the late Confederacy, who held under it a commission in the rebel army, with his prefatory comments, — sanctioned apparently by the deceased judge, — to the seeming intent to show that the editor and his comrades, fighting for their respective States, were men as good and true, in the matter of allegiance, as you and your friends, fighting on your side?

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But the same public, the same *consensus humani generis* by which the *jus gentium* and the *jus inter gentes* subsist, will also say, This is not the only paradox you ask us to accept without criticism. You tell us that you have *discovered* something which the experience of three thousand years of historic civilization has told us is an impossibility; that is, that sovereign powers may be sovereign while forcibly parted; while held, not merely separately, but adversely. Your fathers found themselves living under a *distribution*, in exercise, of such powers. You dreamed that it was a *division* of them, and say that you have demonstrated it by a war, in which, if you are right, the part of those powers held by the States must, as legitimate sovereign powers, have been exercised adversely to those held by the general Government. Though, after all, when it comes to a question about forty dollars in Tennessee bank-notes, your Supreme Court says the plan don't work, that there must be a hitch somewhere, though just where it is, the justices find it difficult to say on any theory of supremacy that has been advocated among you during your one century of political experience.

Mr. Stickney ("A True Republic," p. 118) quotes De Tocqueville writing in 1833: "If the sovereignty of the Union were to engage in a struggle with that of the States at the present day, its defeat may be confidently predicted, and it is not probable that such a struggle would be seriously undertaken." Mr. Stickney adds, "And that, doubtless, was the opinion of most men who then chose to think on the point." Subsequent history has shown, not so much that the French observer was mistaken in judgment, as that he was wrong as to the premises from which he argued. He was wrong in his prediction, because the theory of division of sovereignty which he had got hold of (*ante*, p. 102, n. 1) was not a fact. No such a struggle as he had imagined, between a something holding a portion of

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the powers of sovereignty and a number of States holding other powers of sovereignty, was possible. When the struggle came, it was between States united, on the one hand, and what were *no* States, on the other.

Whatever may be the distinctive mark of republican, as distinguished from other governments, it is, or at least was, up to a recent period, the leading idea in American constitutional politics that the possession of sovereign power should be at all times distinguishable from the organization of the government, — the *forma imperii* from the *forma regiminis*.[1]

In the attempt to distinguish *the United States*, or *the Union*, as a personality possessing sovereign powers, and yet as one not identical with the States which are the members of the Union, it has been practically unavoidable to speak of the general Government as the grantee of these powers, and as a personality capable, by its political nature, of holding them by right of possession as sovereign against the will of each and all the States.[2]

It has often been said in support of the action of the general Government in maintaining its authority against the Rebellion, that the right or power so to act must belong to it by its intrinsic character as *a government*, or on the principle that every government must have the right to provide for its own existence or continuance.[3]

In this may be found an illustration of the ambiguity of words usually employed in stating political distinctions. The term, "a government," "the government," may be used in designating some who hold the supreme power by personal claim; as one may speak of the Government of

[1] *Ante*, p. 298. [2] *Ante*, p. 102, IV. V.

[3] In the article in the North American Review, January, 1864, by Mr. Lowell, entitled "The President's Policy" (*ante*, p. 260, note), it is said (p. 239), "A chief magistrate compelled, for the first time in our history, to act upon the fundamental maxim laid down by all publicists, that the first duty of a government is to defend its own existence."

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Russia, of Turkey, or of Burmah, where governing is the personal right of a sovereign individual, or of his dynasty. To a government in this sense the statement above made may apply.[1]

But here, in this country, there was no such government in existence, unless that which was identical with the organized people of the States united.[2] The general Government, as well as the State governments, was an *employé*, and had no rights as against its employers,[2] the organized people of the States, united. The Government, supposed to be the grantee in perpetuity of certain powers of sovereignty, was not an actual person in being, independently of the grant, corresponding to a monarch, prince, or dynasty, or corresponding to an organized body of individuals like the political people of a State of the Union.

A president and vice-president, a number of senators and representatives, all elected, and certain judges appointed by some of these so elected, and their several subordinates or appointees, all of whom, except as they receive election or appointment, are simple private citizens, exercise powers in governing, and so are the government of the United States. The Government, as a personal grantee of sovereign powers, is an "abstraction."

It is paradoxical to say that such a government can hold anything as against the persons who are in actual existence as original power-holders, — the organized political peoples of the States being united; who, as such, exist and would continue to exist without reference to the election or appointment of the various officials who, as *their agents*, are the Government of the United States.[3]

[1] The statement is that a government, in that sense, may and must make its own existence its own moral end; which is the doctrine of Machiavelli's *Il Principe*. See Woolsey's Political Science, I., § 60.

[2] See the use of the word "government," by Mr. Austin, *ante*, p. 140, note 1.

[3] For this reason there is a fallacy in Mr. Madison's statement in the Federalist, No. 14, which has of late been cited for an authority, — "the

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The General Government not Sovereign.

Mr. Curtis, in the Discourse, etc., already referred to has said (p. 29), "while the war has settled the principle that the powers of the general government were irrevocably granted to it, by a fundamental law enacted by the joint consent of the people of every State," etc. If this means anything, it is that the general government is no such body of *agents*, but such a government as above spoken of, with a personal claim to sovereignty, to be maintained by its own force and will. Whether, in saying that "the war has settled the principle," Mr. Curtis means that a new principle or political fact has been brought into existence by the military success of the persons administering the general government does not appear; but if this is not the case, "the joint consent of the people of every State," if this is a good expression, is as necessary to uphold continuously this government now as at the first moment; and if it were withdrawn, there would be no such government in existence. "The joint consent" was and is a joint consent, because the *power* to consent was and is joint: because it was in joint exercise, and in that only, that the States had their capacity to consent.

The doctrine or statement of the fundamental fact is not varied in the slightest degree by employing the terms, *the Union* or *the United States*, instead of the term *the Government of the United States;* unless the intention is to recognize that the organized political peoples of the several States, being in union, are, as so many living beings, the supreme power-holder, for whom the government of the United States is an instrument, as truly as the governments of each State are instruments for the organized political

great comment of Madison," says Mr. Frothingham (Rise of the Republic, p. 602), that, "If they [the State governments] were abolished, the general Government would be compelled by the principle of self-preservation to reinstate them in their proper jurisdiction." If the political peoples of the several States refuse any longer to sustain their State institutions, then President, Congress, and judiciary will disappear, *ipso facto*.

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people of that State. *The Union, the United States*, in any other sense than this, is a myth, a fiction of the mind.[1]

The fact that the body of persons constituting the general government by exercising the executive, legislative, and judicial functions of a government, for general purposes and with general jurisdiction, had not originally and have not since had the quality of continued existence or of self-continuance, but in order to continue must, precisely as the State governments in this respect, have been renewed by the action of other persons over whose volition, in that matter, they had no control, would appear to be too obvious to require any demonstration.

Mr. Webster, in his celebrated reply to Mr. Calhoun, attempted to make out that the State legislatures or the States, meaning apparently both the members of the State legislatures and the electors of the several States, are *obliged* to exercise their individual volitions in keeping up the *personnel* of the general government.[2] This was simply a grand illustration of the *fetish* conception of

[1] *Ante*, pp. 110–115. Dr. Woolsey, in a passage which has been here already cited (*ante*, p. 95, n.), illustrates the error which is substantially identical with that "exaltation of the organ" which he there reproves. He does this by speaking of *the United States* as something existing, or being sovereign, without reference to "the States which compose the Union." According to my lights, the States which compose the Union *are* the United States, and there is nobody else to be the United States. Compare also *ante*, p. 120, n.

[2] Webster's Works, III., p. 471. "It [the Constitution] makes its own preservation depend on individual duty and individual obligation. Sir, the States cannot omit to appoint senators and electors. It is not a matter resting in State discretion or State pleasure. The Constitution has taken better care of its own preservation. It lays its hand on individual conscience and individual duty. . . . No member of a State legislature can refuse to proceed at the proper time to elect senators to Congress or to provide for the choice of electors of President and Vice-President. . . . Let it, then, never be said, sir, that it is matter of discretion with the States whether they will continue the government, or break it up by refusing to appoint senators and elect electors. They have no discretion in the matter." Compare also Mr. Justice Swayne's language in White *v.* Hart, *ante*, p. 20.

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the Constitution, as of a something having power to maintain its own existence independently of the will of its maker.

As far as at present informed, I do not know that any person, of either little or great reputation, has ever affirmed that the Constitution, being a law in its nature, caused itself to be drafted in the convention and afterward adopted and put in operation as a rule of general government; but it seems to me that that assertion would not be any more preposterous than the doctrine that the Constitution can cause itself to continue to operate as a rule of general government. There is no more reason or necessity for such a supposition now than there was at the first moment of the organization of the government according to the provisions of the Constitution.

That Government began and has continued so far, and will continue, so far as it may continue, for the same reason that governments continue all over the world; that is, because wherever there are human beings there is society, and wherever there is society there is political power, and wherever there is political power those who have the chance to use it will use it.

As the facts are in this country, the organized political people of the States, being in union, have held and used this power; and nobody else; and they could have been expected to hold it and use it for the same reason that those who hold supreme political power, whether they be one or a few or many, in the various countries in Europe, Asia, and Africa, may be expected to hold it as long as they possibly can, — not because it is for the good of mankind in general or of society in general, nor yet because it is for the good of a certain portion of society or of a limited portion of the human race, nor because there was an original compact made by human beings with each other "once upon a time," under which these power-holders are

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bound, as by law, to hold this power; but simply because they have got it and like to keep it.

Government has not existed all over the world from the beginnings of recorded time because it is or was a good thing, or a useful thing, or an indispensable thing. It has existed because men have been so constituted that political power never goes begging. The desire for rule, the passion for power is, so far as the experience of mankind shows anything, as requisite for the continuation of government as other passions for the continuation of the race. That it has made men "wade through slaughter" in the hope of attaining a greater or less enjoyment of dominion, that it has made crime, if committed for its gratification, seem almost a virtue, does not change the fact. It is the foundation of all government, in republics as well as in monarchies, in "these United States" just as truly as in Russia or in Afghanistan.

All government in this country, before and in Mr. Webster's time at least, had been visibly exercised only through persons chosen by certain individuals holding the elective franchise under constitutions and laws enacted freely by themselves corporately, as constituting the political peoples of States in union. Though no coercive power compelling these individuals to sustain such government by the exercise of their franchise was discernible, yet their human nature might have been trusted to induce them to continue to do so. But if they ever should have failed to renew the general government, as provided in the Constitution, then that Constitution would have ceased to be supported by their will, and so ceased to be the Constitution for the people of the United States.

The doctrine that the personality holding sovereignty as a unit, from whom the Constitution, as law, derived its authority, should be found in the nation or people at large, without regard to State organizations, or to the existence

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of the organized political people of the several States, is not a novelty.[1] But its prominence has varied at different periods of our brief political history, and its assertion, from time to time, has been supported on one or the other of two distinct and really opposite grounds.

If the learning, ability, and patriotism of its advocates could, consistently with the nature of things, cause a hypothesis to become a fact, or anything else than a hypothesis, the theory which ascribes the authority of the written constitution of general government to the intelligent act of "the people" or "the nation," as a mass of so many millions living in a certain geographical area, might, long before any events which have occurred since 1861, have acquired the character of history.

It is plain, from the memorials of the period beginning with the outbreak of the American revolution, and ending with the adoption of the Constitution, that there were many prominent men who recognized, more or less clearly, that ultimate sovereignty is incapable of division, although they could not discern any possible possessors of sovereignty, other than either thirteen States, as thirteen nations, on the one hand, or a sovereign mass of population, independent of State boundaries, on the other.

Who they were who then affirmed the one or the other of these alternatives as the fact, is immaterial for the present inquiry.

It may be that the relations of the various congresses from 1774 to 1781, called "Continental," and of the government under the Confederation, were at the time, as they have been since, almost universally taken to indicate that, as matter of fact, each State was, while these relations existed, severally or individually sovereign; and it may also be that, when the Constitution had become the law of the land, it was almost as universally understood as being,

[1] Compare *ante*, pp. 108–115.

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and declaring itself to be, one of two things, as the fact, either —

1. A delegation of powers by so many severally sovereign and independent States to a common agent of government;[1] or,

2. A grant or cession of certain powers, by such States, being so severally sovereign and independent, to a something or somebody, quite distinct from those States which made such grant or cession of certain powers.[2]

But it may also appear, from various records of the time, that there were, in the earliest days of the government under the Constitution, some — and those, too, whose public and private virtues entitled them to the highest consideration — who accepted neither of these views, and who insisted more or less strenuously, according to their opportunities in public and private life, that the Constitution was the legislative act of the nation or people as a mass, in reference to which the States were not the actors, as grantors of political power; or, if such, were so only in a subordinate or representative capacity.[3]

It might be possible, by a minute analysis of this last class of opinions, to show that they were supported by one or the other of two very different, totally distinct, and even conflicting methods of demonstration.[4]

That is to say, it may appear that there were —

First, some who relied on an *a priori* deduction of sovereignty, founded on the social-compact theory of the eighteenth century — the hypothesis, pure and simple, without reference to or care for the historical evidence.

Second, some who professed to have discovered the location of sovereignty in the same people by an *a posteriori*

[1] Compare *ante*, p. 99, I., II., III. [2] Compare *ante*, p. 102, IV., V.

[3] Compare the statements, *ante*, VI., VII., VIII., pp. 103, 104, and IX., p. 108.

[4] See the application of the distinction to this subject considered in Jameson's "Constitutional Convention," ch. iii.

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induction, relying on their view of the historical facts, according to which the people, as a mass of individuals, actually asserted and exercised all sovereign power, either at and in the revolutionary separation of the colonies from the British empire, or at and in a later revolution, occurring in the adoption of the Constitution in 1787.

It is not easy to distinguish the respective followers of these two methods of demonstration; because, as their several political conclusions are the same, their respective arguments have been generally stated as if they were equally acceptable, or could be received together; as compatible, or as each equally true and valid.

In many of the earliest opinions delivered in the Supreme Court, the first of these methods is chiefly illustrated; in which the influence of the prevailing political theories of the time is clearly discernible. The social-compact theory is referred to as unquestionable and as historically exemplified in the adoption of the Constitution, if not also in the Revolution.[1]

Aside from any estimate which may be formed at the present day of the value of the theory of the social compact, it is to be noticed that in the application of the doctrine to their own circumstances, its adherents on the Supreme Bench, or elsewhere, were divided by their several political preferences. While some asserted the doctrine as having been illustrated at this period by the formation of *one* nation in the place of the States which had succeeded to the colonies, it was as confidently relied on by others to prove that the inhabitants of each colony became, and ever afterwards continued, a severally independent state or nation.[2] As they all spurned the historic basis

[1] As in the opinions delivered in Chisholm *v.* Georgia, 2 Dallas, 49; *ante*, p. 187.

[2] A very striking illustration is given in the edition of Blackstone's Commentaries, by Tucker of Virginia, Vol. I., appendix, notes A, B, where

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in their deduction, each advocate of that doctrine claimed for himself the power to discriminate what particular aggregate of individuals should be supposed to have combined in the compact, in order to become "a people" or "a state" at that time. Consequently, they determined this by their several views of political expediency; that is, as they were already prepossessed in favor either of a concentrated or of a decentralized form of political existence.

Among the judicial opinions of the same early period which thus attribute the Constitution to the will of the nation or people, in the same sense of being a mass of individual persons aside from pre-existing political organizations, there may be found, here and there, some passages which profess to discern the appearance and action of such a people, as a historic fact, in the same circumstances in which others, taking the opposite view, saw a manifestation of the independent will of the States, or the several people of each State.

As the theory of the eighteenth century gradually fell into discredit,[1] the historical method became more and more in request to sustain the doctrine; and it is this method which appears more prominently in the later cases, especially of the time of Chief-Justice Marshall and of Mr. Justice Story.[2]

The question of the location of sovereignty, as has already

the editor founds his doctrine of State sovereignty and the right of secession upon the social compact, which he regards as clearly established historic fact.

[1] But it has had a remarkable hold on American political thought. Mr. Webster, in his speech on Mr. Calhoun's resolutions, presented his arguments, in form, on the historical basis. But, referring to the language of some of the State conventions on adopting the Constitution, he said, "These conventions, by this form of expression, meant merely to say that the people of the United States had, by the blessing of Providence, enjoyed the opportunity of establishing a new Constitution, *founded on the consent of the people*. This consent of the people has been called, by European writers, the *social compact*." &c. — *Webster's Works*, III. 477.

[2] Marshall, chief justice from 1801 to 1835, succeeded by Taney. Story appointed 1811, died 1836.

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been noticed,[1] being a historical one, is not judicial in its nature. The members of a court, in accepting their commissions, recognize, each for himself, that they are given by some sovereign authority; but the court, as such, can have no capacity to determine who the persons are to whom the authority of the Constitution, as law, should be ascribed.[2]

Whether any later decisions of the Supreme Court have fallen behind these earlier opinions in their assertion of "the nation" or "the people," as the only source of power, or whether the doctrine of State rights has, at any time before 1861, had the upper hand on the bench, is immaterial. But so far as the opposite doctrine — *i. e.*, that which refers the Constitution, as a law for the distribution of power, to the will and act of the people as a mass, in distinction from the will and act of the States, being united — has been maintained in the Supreme Court, it had been rested, before the war, almost entirely on the Webster and Story view of the instrument, as determining, by its own language, the pre-existence of those who gave it its authority; that is, in short, the argument from the words, "We, the people," — as to which enough, for the limits of this essay, has already been said in a former chapter.[3]

[1] *Ante*, p. 98.

[2] Yet, from the manner in which the writers of the commentaries and text-books still refer to the opinions of the bench on this question, as if the judges themselves considered them in the nature of judicial decision, it should be inferred that these writers were as yet unaware of "the political department," to which the Supreme Court yields so respectfully in this matter. Compare *ante*, p. 290. See Pomeroy, Const. Law, §§ 134–150.

[3] *Ante*, pp. 108–115. Of this argument the English contributor in the London Law Magazine for August, 1868 (*ante*, p. 205, n.), very pithily remarked that it was one "whose only force lies in the reputation of its advocates." The leading judicial assertion of it may be that of Marshall, in McCulloch *v.* Maryland (1819), 4 Wheat. 316,—"The government proceeds directly from the people, is ordained and established in the name of the people."—*Ib.* 403. Perhaps that by Jay, in Chisholm *v.* Georgia, 2 Dall. 470, is equally positive. To be sure, nobody knows whether Jay and Marshall understood by "the people" what Mr. Pomeroy understands by the term, and what Story and Webster appear to have understood. See *ante*, p. 109.

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No Parallel with the French Revolution.

Among those who, in some vague way, have ascribed all our institutions to the authority usually understood by the term "the sovereignty of the people," there have been doubtless many, both here and in Europe, who have supposed that the people of France, in their assertion of their political and civil rights in 1789, followed a course of political experiment in which the people of the American colonies had preceded them in 1776.[1]

But, whether fortunately or unfortunately for us Americans of to-day, there was no such similarity in the political experiences of the French nation and the people of the American colonies, in those crises which each respectively denominates "the Revolution."

When the French revolutionists had thrown off a dynastic monarchy together with the oppressive and degrading privileges of the court and the nobility which had survived those needs of the earlier civilization which they were originally devised to sustain,[2] it was of necessity that the body politic which it devolved upon the leaders of the republic to direct should be a centralized state.[3]

During the previous two centuries, the persistent policy, self-interest, or mere instinct of the reigning dynasty had built up the unitary authority of the king in the place of that distribution of political power which had been the basis of those feudal institutions by which the Gothic conquerors had restored order after the destruction of the Roman civilization.[4] The conditions of nationalization or centralization had been established already by those

[1] De Tocqueville says that the Americans seemed to the French to have only put in practical execution what their own writers had conceived as possible, and to have given the reality of fact to what the French were then dreaming of. Ancien Régime, p. 246, French ed.

[2] Taine's Ancient Regime, Book I.

[3] De Tocqueville, Ancien Régime, etc., Liv. iii. c. 2; c. 5.

[4] This centralizing process was not confined to France. Lieber, Civil Liberty, etc., pp. 49–51.

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whose memories the French revolutionists execrated and whose descendants they massacred. Provincial institutions, local parliaments, estates general, etc., had already been abolished, or were sapped of their vital force, and existed but in name. When a new administrative authority, adequate to meet the internal and external enemies of the convulsed state was to be found, the elements of local self-government, which might have given organic life to such authority, were wanting. A revolutionary despotism could not look for support in traditions of any kind, or in any feeling analogous to that devotion or loyalty to certain persons or families, which, whether deserving of praise or of scorn, had been the strength of the dynastic monarchy. But, in the nature of the case, it was obliged just as much to seek moral sanction. Those then who successively wielded the supreme power set up an hypothesis; they presented themselves as holding the contributed sovereignty of individual citizens, under "the social compact," according to those theoretic systems of Locke, Rousseau and others, which, as the doctrine of "the rights of man," had been sentimentally applauded by the perishing *régime* of kings and courtiers[1] long before they were invoked to sustain the acts of those who at the foot of the guillotine demanded the heads of monarch and nobles in the name of the sovereignty of the nation.

These ideas of the encyclopedic school were the new ideas of the eighteenth century, and the "framers" of the Declaration and of our constitutional laws, as also, undoubtedly, a very considerable proportion of the most cultivated part of the population, were largely in sympathy with them.[2] But, whatever those framers may have wished for, designed, or expected, the fact stands out that

[1] Taine's Ancient Regime, B. iii. ch. iv. 4. De Tocqueville, Ancien Régime, etc., p. 247.

[2] Von Holst, Constitutional History, vol. i. pp. 30, 31.

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the spirit of local self-government, the desire to be governed only by the political people of the State, in severalty, was so strong in the people of the former colonies that any action corresponding with the French realization of *le peuple roi* was out of the question.[1] The truth is, as Von Holst has indicated, — more clearly, perhaps, than a native-born student would have done, — that the people of the nascent republic not only cherished fondly their local political organizations, but even yielded most reluctantly to the pressure of fact — the unwelcome fact — that, except as *united*, the States were not "free and independent States" at all.[2]

But it was equally the fact that, being so united, they — *the States* — were free and independent, and under no dominion of any other, whether one person or many persons, at home or abroad. Being so united in voluntary union, *they* have been recognized, as constituting an independent nation, by other "powers," great and small, — not merely in name or as a geographical expression, but diplomatically, in the international relations of war and peace, acting by successive agencies of government appointed through the electoral action of the political peoples of such States, but being always known as states holding autonomic power, or sovereignty, in union.

It was said by Mr. Justice Patterson, in Penhallow *v.* Doane, 3 Dallas, 54, — "The truth is that the States individually were not known nor recognized as sovereign by foreign nations, nor are they now. The States collectively, under Congress[3] as their connecting point or head, were

[1] The sympathy with the French republic afterwards manifested, in 1791, more especially by one political party (compare Von Holst, i. pp. 107–120), is a matter which does not affect this view of the previous state of public sentiment on the location of sovereign power at home.

[2] Von Holst, Const. Hist. vol i. p. 62.

[3] The "Congress" under the Confederation, which first assembled March 2, 1781, and ratified the Treaty with Great Britain signed September 3, 1783.

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acknowledged by foreign powers as sovereign, particularly in that acceptation of the term which is applicable to all great national concerns and in the exercise of which other sovereigns would be more immediately interested."

This, as I understand the action of other countries, is true, if the meaning is what I understand it to be, from the words and the syntax, — that *the States* united, acting *through* Congress, or "under Congress," as their chosen leader or general, proclaimed themselves "collectively," though not "individually," a sovereign in war and peace, and were so recognized.[1]

The question here is not, who the person or persons are whom foreign nations *ought* to recognize as the sovereign. That question has formerly come up, and may come up again. Whenever it might so come up for the consideration of foreign nations themselves, the opinions of our text-

[1] This opinion by Judge Patterson in Penhallow *v.* Doane is generally cited as having a directly opposite meaning, that is, as affirming that the States were not recognized at all by foreign powers; or that foreign powers knew only of a "congress," or general government, as holding sovereign power. It is true that the passage above cited follows others, in the same opinion, which attribute the possession of sovereign powers to Congress, by "the will of the people." Story has given these, with the passage above cited, as agreeing with the extracts which he makes from Judge Jay's opinion in Chisholm *v.* Georgia, 2 Dall. 470, and Judge Chase's in Ware *v.* Hylton, 3 Dall. 199, which last affirms that Congress, in distinction from the States and by "the acquiescence and obedience of the *people*, . . . properly possessed the rights of external sovereignty."

These *dicta* of our earliest courts are given by Judge Story as sustaining his statement, Comm. § 214. "Whatever, then, may be the theories of ingenious men on the subject, it is historically true that before the declaration of independence these colonies were not, in any absolute sense, sovereign States; that that event did not find them or make them such; but that at the moment of their separation they were under the dominion of a superior controlling national government, whose powers were vested in and exercised by the general congress with the consent of the people of all the States." Judge Story never defined for the benefit of his readers his own understanding of the term (comp. *ante*, p. 109), and whether these judicial statements of history are properly cited by him depends mainly on the question who are the persons intended by the words, "the people," "the people of the United States."

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writers and the *dicta* of our judges would undoubtedly receive from them due consideration. But the question here is, who the person or persons here are whom, having considered the question, foreign nations do so recognize. If we want to see ourselves as *others* see us, we must go to them and ask *them* what *they* see. We must apply to *their* publicists[1] and to *their* courts sitting on international questions.

In the case (1867) United States of America *v.* Wagner, 3 Law Rep., Equity Cases, 724, "the defendants put in a general demurrer, raising the preliminary objection that the bill was filed in the name of the United States of America, without putting forward the President or any individual state officer upon whom process could be served on behalf of the defendant, or who could be called upon to give discovery to a cross-bill filed by the defendant."

It was argued by Sir Roundell Palmer, and other counsel on behalf of the United States,—

"That if the bill had been filed by the Government of the United States, or by the President, as chief of the executive, it must have been held to be a description which the court could not recognize, as Her Majesty knows no such foreign power as 'the Government of the United States,' the treaties being in all instances with the 'United States of America' *simpliciter;* and under that title alone, which is officially recognized in this country, can the United States sue in the courts of this country."

The vice-chancellor, Sir W. Page Wood, held the bill to be properly brought in the name of the United States, though he ruled that "when the United States sue as plaintiffs, they must let the defendant know from whom he can obtain discovery and who is the proper officer to put forward, if that be his mind or desire" (*ib.* 736), and

[1] Compare *ante*, p. 138, n. 2, and citation from Phillimore's International Law. In the same work the author notes Wheaton, Story, and Kent, as authors to be consulted for a general view of the position of the United States as one state in international relations, *ib.* §§ 118, 120.

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sustained the demurrer, allowing, however, the plaintiffs to file an amended bill in accordance with his ruling. In the Opinion delivered at the same time the vice-chancellor said (*ib.* 730), —

"Those who followed Mr. James [for the defendant], went further and said that 'the United States of America' were to be regarded here, not as the great and powerful sovereign community which they are, but simply as a geographical expression. Of course, any such notion would be preposterous, but I was pleased, in the original treaty between the sovereign of this country and the United States, to find an expression which better meets my views than any words which I could use. The great and definitive treaty of peace and friendship signed at Paris, on the 3d of September, 1783, between 'His Britannic Majesty and the United States of America' commences as follows," etc.[1] The vice-chancellor also said (*ib.* 731), "The question, then, is whether, being a body politic (I cannot call them a corporation, for although in some respects the analogy may apply, in others it fails entirely) the United States can sue simply in that name, without naming any person to act in their behalf," etc.[2]

[1] The vice-chancellor recited the preamble only, in which occur the words, "It having pleased the Divine Providence to dispose the hearts of the most serene and most potent Prince George III.," &c., "and of the United States of America to forget all past," &c., &c. The language of the first article is more directly to the point, reading, "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay," and the others by name, "to be free, sovereign, and independent states, that he treats with them as such," &c.

It may be proper in this connection to notice that the term "the people of the United States" does occur, once, in this treaty, that is, in Art. iii.,— "It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind, on" &c. Whether the people are to go a-fishing as a sovereign nation or as sovereign states or as individually sovereign fishermen is not stated.

[2] The vice-chancellor's idea is made still clearer by a passage in the same opinion (*ib.* 784), where he refers to other treaties between the sovereign of Great Britain and Ireland and the United States of America, and contrasts their terms with those of the treaty made November, 1851, reading, "Her Britannic Majesty and the President of the French Republic have deemed it expedient to conclude a special convention." He says, "In that case I apprehend it is clear that the President of the French Republic was the person authorized to deal in all transactions with this country on behalf of himself and the whole body in respect of whose interests he treats."

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The same question in another form was presented to the same court in Prioleau *v.* The United States of America, and Andrew Johnson (July, 1866, 2 Law Rep., Equity cases, 659), on a cross bill (see the case of the United States, etc., *v.* Prioleau, *ante*, 261, n.) to have the President made a party to the suit, for the purpose of being called to produce evidence. The same judge, Sir W. Page Wood, V. C., heard the case and dismissed the bill.[1]

This fact, then, that the States were free and independent *only* in union, while, in union, *they* were free and independent, was, for our predecessors of a century ago, their constitution *as fact*.[2] As fact, they left it for us, whether we may wish it should have been otherwise or not, for, as Mr. Lincoln once said, "We cannot escape history."[3]

They left it, however, for us only as far as they could. They lived and had their day; and we live and have our day, as those who come after us will have theirs.

From the general review in these pages of the action of the Government in reference to the attempted secession of eleven States and the action of Congress in reconstruction, it may sufficiently appear that such action has had general

[1] In this case the vice-chancellor said (*ib.* 665), "What there is to be done in the case of a bill filed by a political body, such as the United States (not a physical, but a metaphysical entity), proceeding as a sovereign state and endeavoring to assert its rights in this country?" If this conception should be thought singular, especially in connection with the opinions in the cases mentioned above, it is not any more so than that of American text-writers who ignore the political people of each State as constituting the State, and who find the States, as well as the nation, by hypothesis (*ante*, p. 110–114). In the United States *v.* Prioleau (2 Hemming and Miller, p. 559), Sir W. Page Wood said, "Certain of the component States of the United States of America, having seceded and established a *de facto* government under the style of the Confederate States of America," etc. Would the vice-chancellor say that a metaphysical entity can divide itself, or be divided by secession of its parts?

[2] *Ante*, p. 130. From the reference made by the vice-chancellor it would appear that the English courts in 1867 were not aware of any change in the political constitution of the United States since the treaty of 1783.

[3] Conclusion of Message, Dec. 1, 1862. Macpherson, Hist., p. 224.

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support only on one or the other of two theories of public law, either, —

1. The theory of an international war and a conquest as of states previously independent of the conqueror; or,

2. The theory of a sovereign government, suppressing a rebellion of States against itself, and restoring them, as its subjects, to their former "proper practical relations."

It is very possible that most of the opinions delivered by the several members of the Supreme Court which relate to the *status* of these States, in the interval between the date of their ordinances of secession and their final reconstruction, might be classified or discriminated, as accepting, more or less distinctly, one or the other of these two views, as above stated, or perhaps some modification of them, which might be stated as, —

1. A view regarding these States, though in the Union, as subject, for the time being, to the international law of war, applied by the victorious government; or,

2. A view founded on the idea of a usurping government, misrepresenting a State, supposed to have been ready, except as prevented by force, to comply with the provisions of the Constitution, which, under this view, was regarded as *a law*, acting on the States as its subjects, to be administered by the general government, not as representing *States voluntarily united*, but a nation or people, to which the States were supposed to owe allegiance.

However convenient the first view or theory may have been found by the court to settle cases arising from the war itself, such as prize cases,[1] and the so-called confiscation cases[2], it can hardly be said that a majority of the judges have carried out this view as a solution of the *status* of the States on the suppression of the Rebellion. That question, indeed, the court, as a whole, has left for "the political department" to grapple with. Or, so far as the

[1] *Ante*, pp. 49, 168.

[2] *Ante*, pp. 62, 174.

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court has indicated a solution of the question, it was apparent, at and since the reconstruction era, that the idea of the written constitution acting as law on the States,[1] and compelling them to be, to do, and to suffer, — the idea of a constitution existing by its own force — the *fetish* constitution — or the idea of a constitution existing by the will of a nation or people which came into existence by this constitution, in virtue of which a body of elected delegates called *the government* may wield sovereign powers as if inherent in themselves personally, — was the idea relied on by the Supreme Court to escape the question, What is a State of the United States?

It may be fair to assume that in this matter, the "loyal" public, or the public which supposes itself "loyal," without being able to say to whom it is "loyal," and the Supreme Court in the cases which have hereinbefore been referred to, have relied entirely on the old methods of demonstration already indicated,[2] viz., the hypothesis and the unsustained assertions of the Story and Webster school; as to each of which, whether logically tenable or not, it is known that they had utterly failed to unite opinions, before the war, even on the bench itself, or to command a general or overwhelming assent elsewhere.

I hope to have made it sufficiently clear that the main object of this essay has been to show that history furnishes a theory of our national existence which could justify the action of the government in resisting secession, as rebellion, and also support the action of Congress in reconstruction; and that, therefore, even if it were possible to "escape history" and make out a different location of sovereign power in the past, the effort to do so, on the part of the judiciary and of private writers, has, as far as these matters were concerned, been entirely superfluous.

[1] *Ante*, pp. 9–23, 211–215.

[2] *Ante*, p. 309.

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The Question of To-day.

But, as already stated,[1] whatever the truth may be as to the past, this question of fact as to the location of sovereign power is always essentially a question of the passing day. History does not prove anything, except as there is a presumption that what existed yesterday has continued to the present moment;[2] and, for us, history which "we cannot escape" is always beginning.

The question, then, in the method of inquiry followed in this essay, is, now as ever, Where do the great undisputed majority of the inhabitants of this country to-day find their ultimate sovereign?

This question is here put simply in a search for evidence; on the principle or axiom stated by Austin: —

"If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent. To that determinate superior the other members of the society are *subject*, or on that determinate superior the other members of the society are *dependent*. The mutual relation which subsists between that superior and them may be styled the relation of sovereignty and subjection."[3]

In applying this principle or axiom, it is necessary to fix some limit in the use of the word "habitual." The word includes the element of time, as well as that of action; but what extent of time, depends on the nature of the action to be known as "habitual." If political changes in the location of sovereignty are to be recognized as possible, the axiom must be understood as admitting that the

[1] *Ante*, p. 285.

[2] On the general principle of continuity, compare Phillimore's International Law, Part ii. c., vii.

[3] Austin, Province of Jurisprudence, etc., Sixth Lecture; cited in 1 Woolsey's Pol. Science, 208. This search for evidence is entirely distinct from that reference of government to the consent of individual natural persons which is constantly cropping out in our legal and political literature.

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"habitual" obedience may possibly have existed only during a comparatively short space of time. The inquiry now proposed is to be confined to the present time,[1] as an era considered to have begun at some time later than the passing of the secession ordinances by the eleven States, and earlier than the close of the war and the reconstruction era.

In view of this same question, I have already argued that if the general public will regard the States of the Confederacy as having been belligerent parties up to the end of the war, then the States-rights version of history was good, up to that time, and the Constitution must be taken to have derived its authority in each State from the consent of the State severally.[2]

[1] A similar inquiry might of course be framed in reference to an era including the period before the war, as by Mr. Jameson, when, after citing with approval, Const. Conv. p. 18, the first sentence of Austin's, as above quoted, he says (p. 29), "What political body, institution, or entity is there in the United States, not in the habit of obedience to any other body, &c., which receives *habitual* obedience from the *bulk* of the Union but the people of the United States? It certainly is not the States, for they have habitually obeyed, each and all of them, the people of the United States ever since the latter entered into a union as one people. The people of the United States, in 1789, threw the existing constitutions of the several States into hotchpot, and repartitioned amongst those bodies the powers they were thenceforth to exercise, giving a portion thereof to the States, a portion to the general government, and reserving the residue to themselves, and the States have *habitually* conformed to the edict which thus curtailed and ascertained their powers." An author who defines "the people," as Mr. Jameson does, as the entire mass of the population, and who is endowed with courage enough to state this as history, is impregnable. Logically, it is a *petitio principii*. The people, with his definition, is no "political body, institution, or entity" at all.

[2] *Ante*, p. 286. An inquiry as to the opinion of the general public on the present location of sovereign power is about the same thing as asking, What has been settled by the war? using an ordinary phrase. I have (*ante*, p. 105) pointed out how the success of the Government against the rebellion has limited *judicial* inquiry to such history as may support the action of the Government in that instance. I have since found the same idea expressed by Mr. Yeaman, in "Study of Government," ch. 18, §§ 10, 22, 28.

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The Question of To-day.

It may then, perhaps, be asked of me, If the general public now says that sovereign power is *now* held by the nation as a whole, as a mass of millions, why not say that it *is* now so held, that the Constitution now derives its authority from such nation; and why not, each one of us individually, recognize this, no matter whether it had been so before 1861 or not?[1]

The readiest answer which I should have at hand for a question of this sort, either now or at any previous time, would be, that the thing asserted, supposed, or imagined as a fact, whether asserted, supposed, or imagined, by a few or by many, is simply a moral and physical impossibility.

Mr. Pomeroy, in his treatise on Constitutional Law, § 37, has remarked, —

"The distinction must be carefully and constantly preserved between the nation and the government which that nation has actively created or passively permitted, as the agent for the expression of its supreme will. The people themselves, the entire mass of persons who compose the political society, are the true nation, the final, permanent depositary of all power. The organized government, whatever may be its form and character, is but the

[1] Notwithstanding the copious assertion by many that their view of the *present* location of sovereign power rests on the historical record, beginning in 1776, it might be suspected that some writers would not object to get support from the proposition above stated. Mr. Pomeroy, Const. Law, after stating (§§ 28–33) three different theories, the first, that of a supreme nation or people; the second, the state sovereignty theory; the third, that of a division of sovereignty, says (§ 34), "Among the leading supporters of the last theory may be named Madison and Jackson. It also lies at the basis of the judgments of the Supreme Court upon constitutional questions rendered during the presidency of Chief-Justice Taney. It had, perhaps, been adopted by a very large portion, if not indeed by a majority of politicians. The events of the last six years [before 1868], and especially those growing out of the close of the war, and the readjustment of disturbed relations, would seem to have brought the first theory into greater prominence; and it may probably become the one accepted by the government and the people." But, if this general acceptance is the test, what is the value of all the argument from history and the nature of things?

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creature and servant of this political unit which alone possesses dominion in itself."

The term "political society" involves, I think, as generally used, some discrimination, from the entire mass of inhabitants, of certain persons as holding the supreme power, or as being the "political unit which alone possesses dominion in itself." Where there are no such persons distinguishable from "the entire mass of persons" in any geographical area, there is no "political society" at all, as I should understand the phrase.

I have herein already indicated the importance of distinguishing between the natural persons constituting the governments existing in the United States, both general and State governments, and those whom I have recognized as being in actual existence as original power-holders.[1] But I understand Mr. Pomeroy and other recent writers[2] to mean that this original power-holder or "unit which alone possesses dominion in itself" is discernible, by themselves at least, in the entire population of this country, as so many thousands or millions of individuals, without distinction of birth-place, age, sex, race, and especially without any reference to the possession of any elective franchise, under any law, whether of the States or of the general Government, or in the written Constitution, and to hold that this body of persons, called

[1] *Ante*, p. 303.

[2] Jameson's Constitutional Convention, *passim*. "Conceding, then, that we are a nation, the answer to the question with which we started some pages back — Where resides the sovereignty in the United States? — is ready to our hand. It resides and must reside in the nation, considered as a political society or body corporate. Back of all the States and all *forms of government*, in either the States or the Union, we are to conceive of the NATION, a political body, one and indivisible, made up of citizens of the United States without distinction of age, sex, color, or condition in life. In this vast body, as a corporate unit, dwells the ultimate power denominated sovereignty." Ib. § 51. That which, according to Mr. Jameson, "we are to conceive" is, to my mind, not conceivable.

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by them a nation, has "actively created or passively permitted" some government by a few "as the agent for the expression of its supreme will."

I have in another place in this essay already noticed Mr. Pomeroy's and Mr. Jameson's references to Dr. Brownson's and my own view of the investiture of sovereignty in the political people of the United States,[1] and, when citing Mr. Austin's language on that subject, I have also noted Mr. Jameson's objection to the view conveyed by it.[2]

I here copy Mr. Jameson's remarks in that connection, not only to acknowledge his generous allusion to myself, but also because they present distinctly the difference of opinion on a question of fact which, in my own judgment, is the fundamental question for the future in the politics of the country.

After citing Mr. Austin's language, Mr. Jameson observes, —

"There is, perhaps, some ambiguity in this passage, as it is not clear whether, by the body of the citizens of a State 'which appoints its ordinary legislature,' the author means the totality of its citizens, forming a corporate unit, which, 'the union apart' *virtually* appoints the legislature, or the body of the electors which immediately and formally appoints it. If the former was intended, his theory was clearly what I have supposed above [that is the theory maintained by Mr. Jameson himself]; if the latter, it was the wholly untenable one, that sovereignty in the United States inheres in the electors or voting people of the respective States, considered 'as forming a collective whole,' — a theory which has the sanction of so eminent an authority as Mr. Hurd."[3]

A supreme lawgiver, of whom it can never be known when or how or where he is saying, willing, or thinking

[1] *Ante*, pp. 127, 128.

[2] *Ante*, p. 140, n.

[3] Const. Conv., § 60, with reference in note to Law of Freedom and Bondage, Vol. I., § 343, note 2. In § 61 Mr. Jameson cites Brownson's statement (Am. Rep. pp. 220, 221 *ante*, p. 135, n) of the doctrine which he designates as "wholly untenable." This doctrine has been clearly and forcibly expressed in Bateman's Political and Constitutional Law, §§ 92, 93.

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anything, who is not "available," not "come-at-able," to use the expression of an English writer,[1] whose legislative will is known only by his submission to the decrees of somebody who is available and come-at-able, is, to my mind, no lawgiver at all; and a sovereign who gives no law, and yet can never abdicate, is, to my mind, no sovereign.[2]

I have pursued this inquiry with the assumption that the conditions of political existence must be the same for Americans as for any other human beings.

Mr. Pomeroy, in continuation, says of his doctrine, —

"This great principle of human rights and of political science, which was distinctly announced to the world, and first practically acted upon by our own forefathers, and which is theoretically admitted by most writers on Public Law, has been virtually overlooked or forgotten by many supporters of the 'State Rights' theory, in the protracted discussions that have arisen upon the Constitution."

That which is here called a "great principle of human rights and political science," whether it be true or false, has no value for determining the claims of "the State Rights theory." Somebody will have to discriminate what assemblage of individuals shall be taken to constitute a people. The "principle" would apply just as well to the

[1] "There ought to be, in every constitution, an available authority somewhere. The sovereign power must be *come-at-able*. And the English have made it so." Bagehot's English Constitution, p. 162.

[2] Mr. Jameson says, Const. Conv. p. 20, "A true sovereign can never voluntarily abdicate or divest itself of the sovereignty." Also, "Sovereignty is inalienable; [Why, then, the word "voluntarily"?] that is, 'society never can delegate or pledge away sovereignty. . . . Being inherent, naturally and necessarily, in the state, it cannot pass away as long as the latter exists.'" Citing Lieber's Pol. Ethics. I understand Lieber, in the place cited (Book ii. § lxiii), to be merely combating the idea that the individual members of society or of the state are each sovereign; and so Brownson's Am. Rep. 135, also cited by Mr. Jameson. Dr. Lieber's "society" or "state," had no geographical limits, and his attribution of "sovereignty" to it has not the slightest value in indicating the duty of a private citizen; which I take to be the practical test.

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population of each separate State as it could to the population of the entire country geographically known as the United States. That is, it would so apply if all reference to a historical location of political powers is left out of view.

In fact, it may easily be shown that the "principle" has been affirmed and appealed to for support, quite as heartily by those among "our own forefathers" who maintained the several sovereignty of each State as it has been by any other school of "writers on public law." [1]

Mr. Pomeroy proceeds to say, —

"The intentional ignoring or tacit rejection of the same doctrine is the fallacy which runs through the whole of Mr. Austin's elaborate lecture upon the nature of the independent political society and of political sovereignty, found in the first volume of his 'Province of Jurisprudence,' and which thus destroys much of the usefulness of that treatise.

"It is certainly unnecessary for Americans to argue in favor of the correctness of this principle. Our whole political structure, our whole civilization, is based upon it. So true is it to nature and humanity that not only have European publicists adopted it, but even the European governments do not now reject it; and some of the most arbitrary claim to wield their power by virtue of an authority derived from its practical recognition. The idea that the rulers, whether one or many, compose the state, is a thing of the past, a notion which has been swept away in the resistless march of social development."

[1] A modern illustration may be found in a work on Political and Constitutional Law, directed specially against Mr. Pomeroy's treatise, by Mr. W. O. Bateman, of St. Louis, one of the few who since the war have written in defence of State sovereignty. In this work I find (§§ 52, 53, 54) the same "principle" relied on and the same judicial opinions (Iredell, J., in Penhallow *v.* Doane, 3 Dall. 94, Chase, J., in Ware *v.* Hylton, ib. 199) which are referred to as authorities by other authors, making a directly opposite application. But in the discussion of this matter such citations of the same *dicta* to support diametrically opposite views are by no means uncommon. *Doctrine* and *history* are confusedly mingled. Compare *ante*, p. 99.

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Austin's Distinction of the Sovereign.

Whether "the idea that the rulers compose the state" can be justly attributed to Austin or to anybody else depends on the meaning attached to the word "state." If the word is taken to mean the person or persons by whose intelligent will and action law exists in and for a community within certain geographical limits, it is "a notion" which no amount of "social development" can sweep away. Austin's proposition was not that the rulers compose the state. He, at least, was one of those who could not conceive of a state consisting of nobody but rulers.[1] Austin's proposition was, simply, that there must be some persons, visibly, tangibly, audibly distinguishable — distinguishable by the bodily senses — from the whole community as a mass, who, as matter of fact and sense, — not by hypothesis or imagination, not merely "virtually,"[2] — act in the matter of making law without reference to any similar action on the part of others; and that, otherwise, there is no state or political community to be recognized.[3]

[1] That "notion" belongs to a different school, which, though it appears to have had a resurrection since the war, was in greater vigor at the close of the last century with some of "our own forefathers." Judge Jay, in Chisholm *v.* Georgia, 2 Dallas, 470, said, "At the Revolution the sovereignty devolved on the people, and they are truly the sovereigns of the country; but they are sovereigns without subjects (unless the African slaves among us may be so-called), and have none to govern but themselves. The citizens of America are equal as fellow-citizens and joint tenants in the sovereignty." Wilson, J., in the same case said, "Under that Constitution there are citizens, but no subjects." It is this school which, having been under an eclipse, now sets itself up to justify our past and to determine our future. Compare *ante*, p. 114.

[2] Mr. Jameson's term, *ante*, p. 326.

[3] The author of the well-known treatise on Ancient Law, Dr. Maine, in a paper On the Conception of Sovereignty, &c., says, "First, then, the human superior, who is to be sovereign, must be *determinate*. He need not be a *single person* or *monarch*. . . . There can be no grosser mistake than this, though it is constantly perpetrated by jurists whose place of birth leads them to associate 'sovereignty' with 'despotism,' and who are perpetually committing themselves to propositions which, if considered rigorously, would either deny the existence of governments like our own and that of the United States, or at all events brand them with the stigma of illegitimacy.

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Whether the persons so distinguishable are called "the government" or "the sovereign," or "the supreme power," or are designated by any other name, the fact is always and necessarily the same.

There are probably many who would say that "the 'sovereignty of the people' means neither more nor less than the admission that in civilized countries the government exists for and ought to be, in the main, carried on in obedience to the wishes of the majority of the nation."[1] Nobody could ever question that, in all ages, "the rulers," whether few or many, as well as other folks, have had to accommodate themselves to circumstances, and that one very material circumstance they always have had to consider was what the people they ruled, or at least some portion of that people, thought right and proper, or, at least, for their own interest in their day and generation. Nobody now questions that, as civilization has extended with "the resistless march of social development" as Mr. Pomeroy says, the portion of the people who can frame and express a judgment as to what is right and proper, or what is for their own interest, becomes relatively larger; while their judgment becomes more and more easily discernible by those who rule.

It is true enough that such "a principle, if it be, like every other principle, but imperfectly obeyed, certainly is,

Nor, again, can 'sovereignty' be said to reside in the entire community, — an error the exact opposite of the misapprehension just alluded to, and one to which French writers on public law seem especially liable. Their meaning may, perhaps, be that no body of individuals, except the entirety of the people, *ought* to be recognized as superior; but a dogma like this is something very different from the statement of a *fact;* and the truth is, that no government corresponding with the description exists in the world. All polities are either *monarchies* or *oligarchies*, since, even in the most popular, women and minors are excluded from political functions." Papers, &c., Juridical Soc. Vol. I, Part i., London, 1855, p. 80.

[1] Quotation from a letter of A. V. Dicey to The Nation, No. 789. Aug. 12, 1880.

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through the greater part of Europe, as in the United States, a recognized axiom of government."[1] But the "axiom" has a very different significance for governments where the rulers are a few, individually distinct from the persons ruled, as in "the greater part of Europe," and for governments where those who, being collectively the rulers, are individually a large part of the persons ruled, as is the case in the United States. It is only in the first of these instances that public opinion, as a power against the government, or constraining the government, can be said to have much force. In a theoretically perfect democracy, public opinion and the opinion of the governing body must be one and the same thing. There is, therefore, less room for manifestation of public opinion as against the government here than under the arbitrary governments of Europe. It may be said with truth that "its power is, in fact, most observable in states which do not possess democratic institutions."[2]

A representative government being dependent for its existence on the will of a majority of the electors, a public opinion opposed to that government must be supposed to be adverse to the wishes of this majority. Such a public opinion could be found only in the wishes of others who are not electors, or of a majority of such; agreeing, perhaps, with the wishes of a minority of the electors. To find a manifestation of "sovereignty" in a public opinion based on such a calculation of numbers is to elevate faction into an institution of government. The most obvious hope

[1] Mr. Dicey's letter. For these reasons I should say that public opinion was the manifestation of the very opposite of sovereignty instead of being one of its marks or manifestations, as said by Mr. Jameson, Const. Conv. p. 22, and by Lieber, Pol. Ethics, Book ii., § 65. Lieber quotes Napoleon and Talleyrand as recognizing its force as superior to their own plans or purposes, which I regard as illustrating how distinct public opinion is from political sovereignty.

[2] Mr. Dicey's letter.

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offered by democratic institutions is to exclude such manifestations, by rendering them practically useless.[1]

Even when the significance of "popular sovereignty" is reduced to that of "public opinion," as an equivalent term, the question in our case is of identifying "the people" whose "opinion," or "sovereignty," in that sense, is to be obeyed. And this can only be determined by first determining a political fact. A States-right publicist might admit that the States, meaning both their governments and the organized political people, ought to adapt their political energies to enlightened public opinion definitely expressed. He would probably concede that, in the exercise of powers confided by the States, as he would say, to the general Government, it should be guided by the public opinion of the whole country, including Territories as well as States; but he might reasonably demur, if told that, in the exercise of other powers not so entrusted to the general Government, the State governments or the State electoral bodies were under an obligation to disregard the general wishes of the inhabitants of the State and look to the public opinion of the people of the whole country, without regard to State limits. He might justly say that, whether that was or was not a good way of carrying on a government, it was at least diametrically opposed to the theory of freedom with government bequeathed by our fathers which we had for a century been boastfully holding up for the admiration and imitation of the world.

But this reduction of popular sovereignty to the mere force of public opinion would not content those writers whose views I have been considering. If this were all

[1] However much sovereignty Lieber may have recognized in public opinion he could say, "The citizen ought not to be subject to . . . the dictation of mobs, nor any people who claim to be *the* people; indeed, to no dictates of the people except in its political, that is, its organized and organic capacity." Civil Liberty, &c., p. 109.

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they understand by attributing political sovereignty to the people of the country as a mass of population, there would be only a verbal controversy, of which it might well be said that it could have no material consequence in the practical politics of this country. Had I supposed that this was all that could be inferred from their words, these pages would not have been written.

In a previous chapter, after stating the proposition that sovereignty is indivisible, I presented, as the alternative for courts holding the judicial power of the United States Government, either to recognize, in the history of the past continuing to the present moment, some one personality or one aggregate of personalities, holding sovereignty as a unit; or, to accept secession as a right, before 1861, and the whole action of the general Government since that date as usurpation, now legal and constitutional only as by successful revolution.[1]

Following out this alternative, I further maintain that if, in justification of that action of the general Government, the courts have relied on a supposed possession of sovereignty by the people or nation as a mass of population, that is, on the doctrine of the sovereignty of the people as maintained by Mr. Pomeroy and others, instead of recognizing it as vested in the political peoples of the States voluntarily united,[2] the court has accepted the alternative of usurpation by the general Government.

This consequence necessarily arises from the political truth or condition of political life, that as the visible exercise of political power by a nation, as a mass of individuals, is a moral and physical impossibility, some assumption of power, in the name of the sovereign people or nation, is the only possible means by which it can, even in name or appearance, be exhibited. So far as such sovereignty is

[1] *Ante*, p. 107.

[2] According to the view taken herein, *ante*, p. 140.

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thinkable, it is with the thought of such a usurpation included.

And I do not state this as a proposition assumed *a priori*, but as a generalization established from many instances in political history, — that the doctrine of popular sovereignty, or of a nation's existence without the investiture of the supreme power of making law[1] in some *known* person or persons who are *not* the whole nation as a mass of individuals, always brings with it usurping governments.

Americans will not have to go far to find such instances, if they will receive the history of their own country as it has been pictured by the school of jurists who proclaim the sovereign multitude. Mr. J. Q. Adams's discovery of usurpation by the States, at the very beginning of what we have been accustomed to call *their* independence, and Mr. Pomeroy's and Dr. McIlvaine's further exploitation of it, have already been noticed.[2] To be consistent, in holding this view of the history, one should also affirm that no legitimate government has yet existed in this country since the Revolution, and that the worshipped Constitution itself, especially, was established by an act of usurpation, sanctioned, as far as might be, by the passive obedience of the population, — the usurpation of authority, that is to say, by the organized political peoples of the several States, each acting as a corporate body, having the audacity to vote on the question of its adoption.

Mr. Pomeroy, in illustrating his own "conception of the

[1] Die Souveränetät der Gesetzgebung. *Ante*, p. 97.

[2] See *ante*, p. 124, note 1. The objection is there stated against the action of the State governments in the Confederation. But I do not see why it should not be equally applicable against the adoption of the Constitution by the electors of the several States. The explanation which is apparently relied on is, that the voters in all the States, voting as State electors, acted as *representatives* for the people of the whole country. But nobody has attempted to show any conscious action by that "people" appointing them to be *their* representatives. Compare *ante*, p. 111.

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imperial character of the people as an organic political society" by a parallel says, —

"Nor is the thought peculiar to our own social condition; it is a dogma which lies at the base of all political science. The French nation has continued one and the same while its government has taken the successive forms of Monarchy, Republic, Empire, Monarchy, Republic, Empire [Republic, once more] again. The several forms were, for the time being, the recognized organs and channels for the utterance and execution of the organic will of the people, in whom alone, as the final source, reside all the attributes and functions of legislation." [1]

As I understand the author, he asserts that the principle that sovereignty inheres in the nation as a mass was maintained and illustrated in all these successive changes, each government being the legitimate instrument of the will of that nation.

No more striking instances for the generalization above made — that the doctrine or assumption of the sovereignty of a nation, as found in the entire mass of a population, involves usurpation — could be found than that given in France, during the last one hundred years, by the persons controlling at various times the government, and who successively claimed that none other than themselves represented the nation. Louis XIV, saying, "L'état, c'est moi," only said the same thing. "L'etat" — the state — in the language of his time, answered exactly to the idea of "the nation," "the people," of modern France and of this

[1] Const. Law, § 88. It seems to me that Mr. Pomeroy is particularly unfortunate in his illustrations here. He gives "the English people" as affording another proof of his theory. Certainly France and England cannot both be good as examples. The English nation has never asserted the French doctrine. There has always been a recognition that there was a portion of the community holding the supreme power, as Mr. Pomeroy himself proves by what he says, *ib.* § 90. If mere national continuance illustrates "sovereignty of the people," why not take China? We do not know much about their institutions; but the Chinese nation has existed long enough.

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school of American publicists. The only variation in France, since monarchical centralization supplanted feudal distribution of sovereignty,[1] has been in the number of the pronoun of the first person. It has been either "L'état, c'est moi" (*I* am the state) or, "L'état, c'est nous" (*We* are the state), — as the state might be called kingdom, republic, or empire; but the nation, people, or state was equally active or passive in each instance.[2]

It is true enough, as has often been said, that some of the most arbitrary governments in Europe profess to rest on the idea of the sovereignty of the nation or people, and to act only in obedience to the will of such nation or people. But it would be a revelation to them and to "most writers on public law" to be told that they had derived their ideas on this matter from a discovery made by "our own forefathers" and our example, if that is what Mr. Pomeroy means. If I understand his own description, in the same connection, of the political events in which those forefathers were the actors, he himself makes it very plain that, whatever philosophical notions they may have had on the subject,[3] they did not act on any such theory as his, when it came to practical statesmanship. With Dr. McIlvaine and all the writers of the same school, he shows that, in action, the ideas of State existence, State sovereignty and local independence, most wrongfully, as they

[1] *Ante*, p. 813.

[2] Compare the historical summary by Professor C. K. Adams, — Democracy and Monarchy in France. Mr. Pomeroy in another place speaks of "the imperial policy of consolidation which has made France the sport, now of a despot, and now of a mob, at Paris." Const. Law, p. 76.

[3] The fact that a man's political philosophy is not a sure indication of his statecraft is illustrated by Frederick the Great of Prussia and his posthumous code, which might have served as a model for the French Declaration of Rights of 1791. An analysis is given in note to De Tocqueville's Ancien Régime et la Révolution, p. 59. The same author, in a note to p. 237, notices the contempt which the revolutionary governments in France manifested for the will of the majority.

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declare, carried the day. All these writers represent the *idea* of nationality as a growth from seed generated by the Constitution, not as its cause; but they now propose that the effect should be taken to have retroacted, and be presented, historically, as being its own author.

Mr. Curtis, as has been seen, thinks that the division of sovereignty between the States and the general Government was the thing settled by the war.[1] Mr. Pomeroy, Mr. Jameson, and others say that the investiture of sovereignty in the nation as a mass was the thing so settled.[2] But each party claims that the thing so settled was "an American discovery," — a political revelation, made by our fathers a hundred years ago. The question with regard to either supposed discovery is whether it is a possibility. Mr. Curtis's theory may be original, if possible; but that of Mr. Pomeroy and his school, if possible, is not original. If there is anything in our political methods with which we can posture before the world as inventors, it is not this time-worn pretext for despotic governments.

If the primary political fact in this country has been and now is that sovereignty was and is vested in the political peoples of the States united, or, in other words, if the term "We the people of the United States" in the written Constitution has indicated and now indicates those political peoples of the States united, — the connection between this people and that Constitution, as the law resting on their will, together with all legislative, executive, and judicial action of the general Government, is apparent. This connection is all matter of record; as clearly as the connection between the known residents of a New England township and the action of a town-constable exe-

[1] *Ante*, pp. 299, 304.

[2] What is to become of Mr. Webster and "the best minds in New England" (*ante*, p. 115, note) if Mr. Pomeroy and Mr. Jameson are to be trusted? Must it be supposed that "the best minds" have gone West, carrying Mr. Webster with them?

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cuting their resolves passed in town-meeting, which is proved by the clerk's minutes, or as the connection between a private grantor and his conveyance of a house or farm, which is proved in the county registry.[1]

If, on the other hand, the primary political fact has been or now is that sovereignty was or is vested in the nation as a mass, or, in other words, if the term "We the people of the United States" in the written Constitution has indicated or does now indicate the nation as a mass, the connection between this people and that Constitution, as the law resting on their will, together with all action of the general Government, is not apparent.[2] There is no record of any sort to show it. It can be known only as some person or persons may appear to have succeeded in using political power in the name of such people.[3]

[1] "Judging by the *regular* exercise of sovereign powers in the United States — that is, by the constitution of government now established, — sovereignty would seem to reside in the people as discriminated into the groups known as States." Jameson's Const. Convention, § 57. The author's argument, however, would require, as major premise, that, in this matter, appearances always indicate the contrary. The whole section is one of the most remarkable in the work referred to, as illustrating the method of reasoning by assertion which has characterized this school from the day of Chisholm *v.* Georgia.

[2] It must be borne in mind that no judicial assertion of the existence of such a connection, unsupported by the historical record, can become *testimony* to the existence of such a connection; even though the judge making the assertion should be the wisest and best among men. Indeed, when so unsupported by the record, the higher the judicial position and the higher the character for wisdom and goodness of the person making the assertion, the more evident is the failure to produce the effect of evidence supporting the existence asserted. No clearer instance of this failure to show any connection between the Constitution and the action of the people as a mass could be found than that in the assertion of its existence made by Chief Justice Marshall, in McCulloch *v.* Maryland, 4 Wheaton, 404, in the passages cited in Story's Commentaries, § 362, in which Marshall argued — if such can be called arguing — that the fact that the Constitution was adopted in each State by the political people of such State, as distinguished from the State governments, was in reality another and totally different fact, that is, its adoption by the people of the whole country without distinction of persons or of States. Compare *ante*, pp. 109–113, 312, 323.

[3] *Ante*, p. 333.

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By this last supposition, theory, or doctrine, whether taken as true before or only after 1861, the only facts underlying all our political life have been, or now are, two facts without any necessary political relation or any connection in the order of their origin, — one the existence of a nation or people as a mass; the other, the existence of a government assuming to administer a written Constitution as a supreme law of the land.[1]

If this last supposition is presented as having been true before 1861, as well as afterwards, it must also be held that, though the historical adoption of the Constitution by the several political peoples of the States was an act of usurpation, as against the nation as a mass,[2] yet, being condoned by such nation, it enured for the political benefit of the government organized according to such Constitution; so that, by it, the political peoples of the States in their corporate capacities became subject to the government they had themselves wrongfully set up, as if by their united wills.

As nobody could show that a nation as a mass had authorized the States in union to represent it when they adopted the Constitution, it is certain that no political method of ascertaining the will of the nation as a mass has as yet been even suggested. The political rights of the States in union, antecedent to the Constitution, being then ignored, the Government is not the agent of the States in union; while, by assuming the Constitution as a law which it is to apply, it makes itself the author of such law.

[1] As this theory or doctrine is presented by its adherents, the Constitution, acting as law, is postulated as one fact, independently of its being applied by any body. The nation is supposed as the other fact; but no connection is shown between them. Compare Pomeroy's Const. Law. §§ 14–16, pp. 10–12, of the fourth ed. This is the fetish Constitution. A Constitution for which no authority can be proved is not a fact at all, except as any written piece of paper is a fact.

[2] Compare *ante*, p. 384.

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It would then appear, under this last supposition, that this Government has, though by a sort of necessity, actually followed the old method of European governments indicated by Professors Pomeroy and Jameson. It has usurped sovereignty, as against the nation itself, by presenting the Constitution, not as the law of a known legislator, the pre-existent States in union, under which law it should itself exist, but as a law which, in the name of the sovereignty of the people, it proposes to enforce as a rule binding on States and on people.

If this last supposition is presented as true only since 1861, and if it is granted that before that date sovereignty was vested in the political peoples of the States, being united, the general Government, by taking this position, might be thought to have usurped sovereignty as against the political peoples of the States; unless it can also be now shown that a revolutionary change in the seat of sovereignty, not due solely to the action of that Government, but supported by irregular popular force, has occurred.

Whatever may be the consequences logically involved in accepting this supposition or theory, it is one of the facts of this particular case that the persons who, with the judiciary, constitute the general Government are sworn to maintain a written Constitution which in its terms provides for and limits this general Government; and they therefore must present themselves as controlled, in some sense, by its provisions, while they undertake to enforce it as law in the name of the sovereignty of the people.

This Constitution or law has indeed been changed in some particulars since the war; but so changed by Amendments adopted in apparent accordance with the tenor of the provisions on that subject in the original Constitution of 1787.

It may perhaps be said, in suggestion of a doubt, that,

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judging by the past, the Constitution *as law* could be administered by the same sworn officials whether the State-rights version of history, or the Madison and Jackson version of a division of sovereignty, or the Story and Webster version, resting on the words "We the people," etc., or any other version hitherto offered was adopted.[1] It may be said that the supposed change, by usurpation or by revolution, has, apparently, at the most made that to be true in fact, or historically since 1861, which before that date had been asserted as then existing fact only by the school of Story and Webster.

It may then naturally also be asked, —

First, — How could it at any time be known that this written Constitution has, as a law, expressed or may hereafter express the will of one sovereign, — the supposed nation as a mass, — instead of having expressed or hereafter expressing the will of another sovereign, — the supposed States in a voluntary union? and,

Second, — How has the supposed revolutionary change made or how can it make any practical difference in the matter of public or private rights and obligations?

On the occurrence of any revolution, as the histories of all former revolutions show, nothing is more difficult to prognosticate than how it will be felt or be known as a revolution. But an answer to each of the above inquiries may be suggested by the following considerations which apply more directly to the first, — How can it be known that such a revolution has taken place?

This written "Constitution of the United States" is the only rule of government which, under this last supposition, can be assumed to exist as the expression of the will of the nation as a mass. In this, previously to 1868–1870, provision

[1] This may appear from the circumstance that, though every variety of opinion on this matter has been held by judges, by executives, and by members of Congress, yet nobody has been impeached merely for his opinions.

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had been made for the organization of a general Government only; no provisions for organizing either State administrative governments, or the political peoples of the States, directly,[1] or otherwise than by the agency of that general Government, in the admission of new States,[2] were combined with it.

The idea of pre-existence of *States* united, as requisite to the existence of any Constitution of the *United* States, being excluded, as it is under this last supposition, it would therefore appear that the Government, as the only one to claim authority in the name of the nation as a mass, must claim to stand in the relation of a superior to any others which may actually or possibly be found within the na-

[1] A limitation on the self-determining power of the political people of each State was introduced by sect. 1 of art. XIV., adopted 1868, "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside," and sect. 1 of art. XV., adopted 1870, "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude," and sect. 2, "The Congress shall have power to enforce this article by appropriate legislation."

[2] Allusion only can here be made to a matter of theory which might properly have been noticed in connection with the subject of ch. IV. There are probably many who think that in the admission of new States, as provided for in the Constitution, art. IV. sect. 3, the subordination under law of those States, at least, in having received their existence from something called "the Union," according to a Constitution whose pre-existence could not have been derived from their own possession of sovereignty, has been historically demonstrated. It has been said of "the States formed since the adoption of the Federal Constitution. They, instead of regarding themselves as the creator of the Union, are forced by the facts of their history to look upon themselves as its creatures. They owe to it all they have and all they are. There is nothing historical about the State-rights doctrine in these new communities." — *The Nation*, Oct. 7, 1880. This is another illustration of the idea of a Constitution existing *per se*, and of the lawyer's point of view. The entry or birth of a new State of the Union was not a fact under the Constitution *as law*, nor under any law. It was a political fact in the transmission of sovereignty; as much so as the fact that the original thirteen colonies acquired sovereignty as States in union. The new State accepted participation of sovereignty in the democratic oligarchy (*ante*, p. 140), and forthwith the Constitution derived its validity from States in union, numbering one more.

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tional dominion. That is, it must stand in this relation not only to the administrative governments organized in the several States, but also to the corporate peoples of those States, who, by their several action, have organized such administrative State governments, and who in appearance voluntarily instituted that general Government by adopting the Constitution of the United States, and who still appear to act voluntarily in sustaining the existence of such Government from time to time, by electing persons to constitute such Government.

Under the supposition that the Constitution as law was derived from the will of the organic political peoples of the States united, they, like other sovereigns, might be supposed capable of taking care of their own political existence, power, or right; or it would be the duty of the general Government to do this, only as it might be incidental to the discharge of its prescribed duties, as their agent, under the law given by them in the Constitution. The Government would have no right to go beyond this law, with the general purpose to maintain the sovereignty of those upon whose will the continuance of the law was to depend.[1]

But under the other supposition, the position of the Government may be very different. Under this supposition, the possession of sovereign power by the nation as a mass can be known or felt only as there may be a government assuming to act supremely by administering a constitution, as law, in the name of such nation. Therefore, it must become the duty and right of the general Government to maintain its own existence as a supreme or sovereign government; this being the only method in which the sovereignty of the nation as a mass can be preserved at all. In being the only manifestation of the nation, that Government must have the political right and duty to maintain itself as

[1] Compare *ante*, pp. 201, 302, 303.

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sovereign against all persons, whether acting as private citizens or as corporate States, and, in this general purpose, it cannot be bound by the Constitution as the limit of its powers; because, by this theory, that Constitution is not law at all, except as that Government may sustain it.

It is in harmony with this supposition to hold that the States are political organizations, whose rights, under the Constitution as law governing them, to send senators and representatives to Congress and to contribute a proportion of the members of the electoral college,[1] are trusts in the hands of the political peoples of the several States for the object of continuing the existence of the general Government.[2]

It might seem from this that no action of a State in its corporate capacity as one of the United States could interfere with the fulfilment of this obligation; that, while recognizing the existence of the State as a member of the Union, the general Government could distinguish between voters "loyal" and voters "not loyal" in this political relation between the States and the general Government; and that, however insignificant in number might be the proportion of the voters of the State willing to perform this trust, the general Government should recognize them as capable of sending the State's whole quota of

[1] I here assume that the original intention was to form an electoral college, the members of which should cast their votes individually or as expressing their individual preference. In practice, as is well known, the votes are given as the solid vote of the State; giving greater strength to majorities in the States, and making it possible to elect the executive by a minority of the voting people of the States. This is an exhibition of States-right idea growing up under the same Constitution which is supposed to have generated "nationalism" only.

[2] Compare Mr. Webster's argument, *ante*, p. 305, n. Also Mr. Justice Swayne's: "The States are organisms for the performance of their appropriate functions in the vital system of the larger polity of which, in this aspect of the subject, they form a part, and which would perish if they were stricken from existence and ceased to perform their allotted work." *Ante*, p. 20.

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senators, representatives, and electors, however large the majority opposed to exercising this right and to joining in maintaining the *personnel* of the general Government.

It would appear consistent with this view that the Government should have the power to discriminate the "loyal" citizens from the "disloyal" by means of test oaths, and to secure "loyal" citizens in freedom of action by its own administrative power.[1]

Moreover, if such should be the actual powers and duties of a government under any theory of its existence, it may reasonably insist that the written public law should be so expressed as to leave no doubt as to the political duty of the citizens.[2] The States, regarded as organisms for sustaining the general Government, might be required, it would seem, to effect this by adopting, under the direction of that Government, such amendments to the written Constitution as might be deemed by it necessary or proper.

I have hereinbefore argued that the methods actually adopted by the Government in reference to the Rebellion and in reconstruction might, as a whole, be held constitutional, if the eleven States of the Confederacy had ceased

[1] Under this view it is quite supposable that the persons exercising the functions of the general Government might sustain themselves in power against the will of the actual majority of the people of the country, while preserving the forms of the Constitution. Indeed, it may be difficult to see how any provisions should bind the sole representative of the nation as a mass. It would be correct to say, generally, "The powers originally reserved by the Constitution to the States are in future to be held by them only on good behavior and at the sufferance of Congress." — *North American Review*, July, 1870, article by Mr. Henry Brooks Adams, entitled "The Session," an essay which may be referred to as illustrating very forcibly the operation of the supposed political change.

[2] If the citizen or subject can have a right independent of constitutions and laws, it would seem to be a right to know in advance whose legislation he must obey and whose he must disobey. No such right, however, is alluded to in the Declaration, nor in the Opinions in Chisholm *v.* Georgia and other cases of that period. Probably, because the statesmen and jurists of that time held that the freeman obeys only where he may choose. Compare *ante*, pp. 296, 329.

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to have the political faculties of States composing "the United States" and had passed under a jurisdiction exercised, under the Constitution, exclusively by Congress, as over Territories subject to the undistributed sovereignty of those States which remained in a voluntary union.[1]

But from the considerations above presented, as legitimate under the theory of the sovereignty of the nation as a mass, represented by a government enforcing the written Constitution as a law binding on the States as its subjects, it appears that, under that theory, the same methods of government should be held constitutional — *without asserting any doctrine of State-lapse* — if only thought by such government politically necessary to its own maintenance as the government representing the nation as a mass.[2]

Nothing has been more distinctly affirmed by the Supreme Court than the uninterrupted continuance of the eleven States.

But the supposition or theory which would, as above stated, sustain the measures taken, though the continued existence of those States should be admitted, has no basis in the history of the country before 1861. The assertions by Marshall and Story, and by judges and jurists now living, in contradiction of the record, cannot make a history to support that theory.

Therefore, as the Supreme Court has neither accepted any doctrine of State-lapse nor declared these methods of government contrary to the letter and spirit of the written Constitution, it has, according to the alternative hereinbe-

[1] *Ante*, pp. 145, 201.

[2] In his article in North American Review, July, 1870, Mr. Henry Brooks Adams says, "The resistance to these measures rested primarily on the fact that they were in violation of the letter and spirit of the Constitution, as regarded the rights of the States; and the jurisdiction rested, not on a denial of the violation, but in the overruling fact of necessity." An argument from such a supposed necessity has, in fact, been the only argument offered to sustain those measures. See *ante*, pp. 200, 201.

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fore stated,[1] recognized a usurpation on the part of the general Government, which may have been converted into legal and constitutional action by a political change in the investiture of sovereignty since 1861; making the theory which would support such methods true, that is, making it a correct exposition of the actual possession of sovereign power as historic fact.

For whether the general Government, before 1861, was or was not to be regarded as superior to the States in a voluntary union by representing the nation as a mass, yet if "the bulk of the given society" — the inhabitants of this country in this instance — have "habitually"[2] recognized the action of that Government at that time as legitimate and have also asserted the continued existence of the eleven States of the Confederacy,[3] the theory of our national existence which supports such action must be taken as having received recognition also.[4]

The question, then, is narrowed down to this, — Is this

[1] *Ante*, pp. 107, 333.

[2] See *ante*, p. 822.

[3] No expression that has been uttered on the Supreme bench has had more popular acceptance than that by Chief Justice Chase, in Texas *v.* White, — "an indestructible Union, composed of indestructible States." *Ante*, p. 12.

[4] In the article entitled "The President's Policy," contributed by Mr. Lowell to the North American Review, January, 1864 (*ante*, p. 271, n.), it is said, p. 259, "We believe, and our belief is warranted by experience, that all measures will be found to have been constitutional at last, on which the people are overwhelmingly united. We must not lose sight of the fact that whatever is *extra*-constitutional is not necessarily unconstitutional." This "belief" could be justified only on the basis, above presented, of a revolutionary change. The "*extra*-constitutional" measure contemplated in the article cited was the executive abolition of slavery, as to which "the people" of the Northern States were not "overwhelmingly united," and if a majority of *a nation* as a mass was to be estimated, surely the inhabitants of the Southern States were not to be excluded from the census. So far as the so-called "emancipation by proclamation" has been made effectual, it has been by the subsequent legislative ratification *by States*. Compare *ante*, p. 244, n. 2. Since the note 1, on page 196, was in type Mr. Dana's article, entitled "Nullity of the Emancipation Edict," has appeared in the North American Review, August, 1880.

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investiture of supreme power in the nation or people as a mass, *now* so "overwhelmingly" asserted by the general public, that the courts of law, both of the States and of the general Government, may, should, or must recognize this by accepting the general consequences involved as already indicated?

In an inquiry of this sort, it is almost inconceivable that any statement of the prevailing opinion should be generally received as satisfactory. Only a few suggestions as to the nature of the inquiry can here be offered.

It is obvious that in such an inquiry the readiest and best evidence should be found by learning, as far as possible, upon what ground, or what theory of political obligation, the measures of the Government as against the Rebellion and those of the reconstruction period were, in the estimation of the great bulk of the people, to be justified; whether they were to be defended as constitutional, or only submitted to, though held unconstitutional. In settling a question of fact of this kind, the opinion of those who had opposed those measures as resting on the supposition that the general Government, as representing the people as a mass, was superior or sovereign in relation to the States, and the opinion of those who had supported those measures on the same ground are equally strong as testimony. For, since the measures themselves have actually been carried out, or are now accomplished facts which all have accepted as facts, either willingly or unwillingly,[1]

[1] In making this inquiry, acquiescence in or obedience to political rule is referred to as *evidence* of the possession of political dominion by those whose rule is so obeyed. But some who attribute the Constitution of 1787 to the legislative will of the nation as a mass have spoken of "the acquiescence and obedience of the people" to the Government organized under that Constitution as being an exhibition of sovereignty by that people: as in Story's Comm. § 216, quoting Patterson, J., in Penhallow *v.* Doane, 3 Dallas, 54; and Chase, J., in Ware *v.* Hylton, 3 Dallas, 199, — which is quite a different thing. Compare *ante*, p. 322, note 3.

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the basis on which they must stand, in relation to the Constitution, is indicated by the adverse as well as by the favorable opinion.

This line of testimony would naturally lead the inquirer among a variety of assertions more or less directly connected with the *prospective aims* of the political parties of the day. So far as any of these could be taken to express the belief of individual citizens, in connection with any such party, as to *past* transactions, they would all be equally entitled to a consideration in an estimate of general opinion. The subject of inquiry is the opinion, on a question of fact, of the people of the country as a collection of individuals, each severally capable of having an opinion; and the judgment of persons from every section, South or North, must be equally worthy of attention.

Moreover, if any general policy is now politically supported by one school, party, or section, and politically opposed by another school, party, or section, as leading to measures which *now* would be constitutional, though their constitutionality before the war might have been denied, or was doubtful, the action of both schools, parties, or sections might be taken as testimony that such a change had occurred or had begun to be made effectual.

There is besides a class of opinions which, as they profess to be, or from the position of their authors must be presumptively taken to be, in the nature of testimony on the political fact, may more especially be referred to in this inquiry. This class is to be found in portions of the periodical literature of the country and in the pages of writers who occupy the combined standpoints of the critic, the jurist, and the historian, and who present themselves as writing, not with a view to promote this or that political end or policy, but to furnish a guide for the present and a memorial for the future citizen.

So far as such writers may testify to the question

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whether a revolutionary change in the possession of sovereignty has occurred, their opinions are important *as testimony;* but so far as they may rest their view of the present location of supreme power on history earlier than 1861, their statements are open to the same comparison with the record and their inferences to the same exceptions, as before that date.

It will, I do not doubt, appear political and legal heresy to many if I class the "opinions" delivered by judges in support of judgments in cases at law, including those of members of the Supreme Court of the United States, with the statements of private writers above described, — so far as they bear on the present inquiry; that is to say, if I should hold that, as indications of the location of sovereignty, these opinions are only testimony, and can be nothing else.

The doctrine that the Supreme Court has, under the Constitution, power to determine the political powers of the general Government and of the States, or that it can, in other words, settle, by its opinion as a court, the location of sovereign power, has been always more or less extensively asserted from the first establishment of the Government under the Constitution, and also has had, probably, increasing acceptance up to the present time; independently of the question whether the Government, of which the judiciary is a part, has become, by revolution, the representative of the sovereign found in the nation as a mass.

Such a power, if it existed in the past, must have been derived either from the language of the Constitution, as law, or from the nature of the court, as a court of law.

The language of the Constitution in this connection agrees with the nature of all courts of law, and the power claimed could not be based upon either.

There is no question as to the finality of the judgment of

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the Supreme Court in each case coming within its jurisdiction, as defined in the Constitution; nor any question whether such a judgment is to be carried into execution by the whole force of the Government, civil and military, or can be resisted by citizens or by a State or States only at their peril. In this respect, however, the court is in no other or better position than the tribunals, great or small, of any civilized country.

But it ought not to be necessary for any one brought up with a knowledge of the common law of England and America to be told that, even under that development of unwritten law, it has never been claimed that the opinion of the judge made the law. He should know that the growth of law from adjudged cases is a totally different thing; and that one great purpose of all written or statutory law is to limit such juristical induction from adjudged cases.

I am, however, ready to admit, and desirous to point out, that the correctness of this view of the character of the judicial function, as exercised by the courts of the general Government, itself depends upon that very question of fact, on which the opinions of the court are here regarded as giving testimony. This view assumes that the court is in the same position as the courts of other civilized countries, in relation to the knowledge of the rule which it applies as law in cases coming before it; that is, that it applies the Constitution as law, with the idea that it is the legislative will of a known sovereign, who has instituted the court, as well as the other branches of the Government, to be an instrument for the execution of its will, but without identifying itself with that Government.

But, under the theory or doctrine which makes the general Government a supreme or sovereign government, independently of the existence of the States in a voluntary union, and which presents that Government as the organ

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of sovereignty vested in the people or nation as a mass, it is clear, to my mind, that the Supreme Court is in a very different position, as to the law it will administer, from the judiciaries of other countries. In being part of such a government, its judicial function is also a political function; whether it may assume to decide on the propriety of the powers exercised by the executive and legislative functionaries of the general Government, or may limit itself to accepting their assumption of powers as being a faculty of "the political department," for which the judiciary has no responsibility.[1]

Under this view of the position of the Supreme Court, it may well be held that the "opinions" of the justices are not merely juristical explanations of principles supposed to have determined the decision of a particular case, which decision may be collated or compared with other decisions in analogous cases, to furnish, by juridical induction, a general principle for later cases in the courts, but are, according to their unanimity in the particular case, political legislation, settling, as by decree of a sovereign, the powers of the Government in the future.

Under this view the court is, as has been claimed, "the final arbiter" of all questions of political power; not merely in cases at law which may come before it, in which the extent of that power may be involved, but the final arbiter in the sense in which every ultimate possessor of supreme power is such.[2]

If this position is now claimed for the Supreme Court only on the basis of history before 1861, the claim is not different from any similar claim, if made by Marshall or Story, on their unsupported version of the origin of the Constitution in the will of the nation or people as a mass.

[1] Compare *ante*, p. 19, and note, and p. 218.

[2] The view here given, with the argument supporting it, is identical with that taken by Mr. Pomeroy, if I understand his language, in Const. Law, §§ 123–128.

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Statement of Opinion as possibly held.

But if made as only now belonging to the court, or only since a date later than 1861, the claim may be regarded as part of the testimony to a revolutionary change, which has made the general Government a sovereign or supreme government in respect to the States.[1]

In the nature of the case, any attempt to marshal and weigh, in one or many ordinary volumes, testimony of these descriptions and the various other indices of public belief would be presumptuous. But, for the scope of this essay, it is enough that the opinion *may* be generally or perhaps "overwhelmingly" adopted, especially in those parts of the country where the greater number of population, greater physical resources and material wealth are located, and which, besides, include topographically the States occupying the best strategic position,[2] that sovereignty is *now* held without reference to the existence of *the States*, or of *the organized political peoples of the States in voluntary union*, as political personalities capable of self-continuation by having the ultimate power to determine the elective franchise in each State for the State and for the general Government, and that it is *now* vested in the aggregated millions, the inorganic people, the nation as a

[1] The long note 82, in Mr. Dana's Wheaton, entitled "The United States a Supreme Government," presents a history of the civil war, mostly in relation to international law. The editor speaks of "the republic of the United States," meaning the general Government, as "the final judge in a dispute between itself and the State as to the limits of its sphere," in connection with the statement that "the doctrine more generally received is, that the people of the entire republic as a political community created the republic, as the people of each State created the separate States." He also concludes, "It is enough to say that the supremacy of the republic within its sphere to determine the limits of its sphere is now settled," — meaning, apparently, settled by the result of the war. Compare remarks *ante*, p. 324, note.

[2] That is in reference to the other parts of the country, in the supposed case that this, as "the great point of the debate, "should at a future time come "after all other modes of debate had been exhausted, to be referred to the arbitrament of battle," adopting Mr. Curtis's language. *Ante*, p. 89, note. As to the question of force, generally, see *ante*, p. 146.

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mass, the "sovereign people," in that sense, now represented by the general Government, which therefore is *now* a supreme or sovereign government, without reference to the existence of States in a voluntary union.

It may, I think, be affirmed with truth that the general policy, system, or political method followed by the Government in suppressing the Rebellion as the rebellion of States — a policy which was continued by the reconstruction measures, in treating those States as still members of the Union, though to be dealt with as delinquent States, whose obligations toward the general Government, or the nation represented by the general Government were to be enforced by that Government — was founded on this idea.[1]

But, as this idea or doctrine had no support in the historical record before 1861, this general policy must be regarded as now legitimated by revolutionary action, whether it has been the action of the people of the whole country as a mass, or of the majority of such people, or of the stronger portion of such people, though perhaps only a minority.[2]

[1] *Ante*, p. 321. For the justification of this opinion I must rely on the review of these methods presented in the earlier chapters. Of course, I do not ignore opinions like that of Mr. G. T. Curtis, who has seen no incompatibility between the measures of the Government and the continued existence of the eleven States, — as appears from his article, "A Strong Government," in Harper's Magazine, — June, 1880, p. 106. In continuing the passage cited *ante*, p. 304, from the "Discourse" Mr. Curtis speaks of the war having settled that the powers of the general Government "remain definite, specific, and limited; that the rules for determining their limitations remain just what they always were; and that they can be enlarged or increased or diminished only by the process of amending the Constitution. Every principle which marks the dividing line between the sovereignty of the United States and the sovereignty of each separate State remains in full force." But such conclusions involve the idea of the Constitution operating by its own intrinsic force as a law for the division of sovereign power. Compare *ante*, p. 298. As said in the beginning of this essay, *the war* could not settle anything. It is the action of the Government, as a government, which exhibits the political doctrine.

[2] There is no possibility of demonstrating that the Constitution and the Government under it *ever* had support in the choice of a numerical majority

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Therefore, it may also be said with historic truth that, — in supporting this general policy, system, or political method, and in sustaining measures which, *on the supposition of the continued existence of the eleven States as members of the Union*, were in violation of the letter and spirit of the written Constitution — the people of the Northern States consented to a usurpation on the part of the persons constituting the general Government; that is, not merely to a temporary usurpation of power over those eleven States of the Confederacy and their inhabitants, but to a usurpation of powers previously vested in the political peoples of the States remaining in voluntary union, — the only "United States" then known as sovereign to history and by their own public law or political Constitution.

But when a revolution is recognized, there should be an end of all controversies based on an earlier history. There is no question of constitutionality or unconstitutionality in a revolutionary change. The only alternative for anybody is to accept the change by making the best of it, or to resist it and take the consequences; which choice of alternatives is about equal to liberty to decide whether there has or has not been a revolution at all.[1]

of the nation as a mass of individuals. Least of all, that it had such support during the Rebellion and in the reconstruction era, when great differences of opinion at the North were known to exist. All that is demonstrable is, that an executive and congress and judiciary, sustained by the voters, acting by majorities, in the States remaining voluntarily united, carried their will into execution. But it is not impossible, even if it be improbable, that the majority of the whole nation, as one mass of individuals, were more or less opposed to that will.

[1] In its ordinary acceptation, "revolution" is a shifting of the seat of sovereign power, not merely a change of law by the will of the sovereign. The proposition that "the people," or all the persons governed, are always of necessity the real sovereign (comp. *ante*, p. 325) appears to involve the possibility of sovereignty in revolution, or what Mr. Jameson calls irregular exercise of sovereignty as against regular exercise of sovereignty. Const. Conv. §§ 56, 569. Not meaning the acquisition of sovereignty by some who before had been subject, nor a shifting of the seat of sovereignty, but the

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If, then, the Supreme Court should have supported, or should hereafter support, as justified by a new state of political facts, and independently of changes in the written Constitution by Amendments, any methods of government or congressional legislation which it might before the war have held unconstitutional, it may not be necessarily proper to speak of such action of the judiciary and "the political department" as usurpation. If a new state of political facts may be supposed to have resulted from the will of the unorganized nation or people, as against the organized nation, or people of the States in a voluntary union, the decisions of the court and the action of the executive or of Congress will be only the consequence of a revolution, for which no persons should, from the mere fact of their personal connection with the Government when existing under the earlier condition of things, be held responsible as usurpers.

With the conceptions which we have accustomed ourselves to cherish of the Constitution as a self-acting machine for determining or preserving the location of sovereign power, it is difficult for us to acknowledge not only that it is possible for persons holding the executive, legislative, and judicial functions under the written Constitution, as law, to take this view, without regard to the historical question as it stood before the war, but even that it has become their clear duty. That it is so now is not because they had sworn to support the Constitution as a law, nor yet because they, as citizens, are bound by allegiance to those, whoever they may be, from whom the Constitu-

revolutionary act of the people, as sovereign, against some government supposed to exist only as the organ of such sovereign people. Writers who find sovereignty inherent in the people as a mass are obliged to assume that revolutions are always the intelligent act of a large majority of the communities in which they occur. In point of fact it is impossible to prove, in the case of any recorded revolution, that it was by the desire of a majority, and in most cases revolutions have been obviously the work of a minority.

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tion at any moment may derive its authority as law,[1] but because, by this theory or doctrine, they, collectively or as a government, alone represent or stand for a sovereign nation, which, without them, would not be known as a sovereign nation at all.

This being the primary political fact, it is, moreover, plain that it is now obligatory on each and every one, whether official or private person, to obey this Government as the only sovereign; and the duty of all citizens, native or naturalized, to defend and maintain this Government as the only claimant of their allegiance.

As has already been indicated,[2] this question — whether such change has occurred — is one which judges cannot determine in virtue of their office; but they must, each one for himself as a private citizen, make up their minds by the only evidence which settles such a question, — history, brought down to the present moment, — agreeing, as each one of us must, that whenever the bulk of the community may recognize any present possession of sovereign power, whether different from an older one or not, courts of law must accept such possession as fact if they consent to be courts of law at all.

It might be thought plain enough from the very definition of the term "revolution" that any who will rest on the idea of a revolution must exclude all support either

[1] If a formal oath of allegiance has been unknown in this country, it has been so because nobody could say to whom it was due by any of the theories heretofore acknowledged. Compare *ante*, pp. 274, 298, 329 and notes. The common opinion may be that the American citizen acknowledges no allegiance to anybody. U. S. Rev. Stat., § 1756, prescribe an oath for a person taking office, — that he "will support and defend the Constitution of the United States against all enemies foreign and domestic," and "will bear true faith and allegiance to the same," meaning apparently to the Constitution. This is another manifestation of the "fetish." The faith and allegiance can be due only to human beings. The alien, on being naturalized, is only sworn "to support the Constitution of the United States and renounce allegiance to every foreign prince, potentate, State, or sovereignty."

[2] *Ante*, p. 5.

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from any asserted basis in an earlier history or from any foundation in abstract political principles; as, also, that any who will rest on previous history, or on deduction from abstract principles, must exclude all support from a revolution.

Yet, as long as there is a doubt whether "the bulk of the community," to use Austin's expression, recognize or accept such a revolutionary change as the fact, or, to use Mr. Lowell's phrase, whether "the people are overwhelmingly united" in wishing such a change, any one who has sworn to support the Constitution as law may feel himself in a somewhat embarrassing position. For, as has already been indicated,[1] the legislative and executive powers of the general Government must be greatly augmented if it is hereafter to stand in the relation of political superior to the States; that is, to the political peoples of the several States, as well as the State governments.

Under such circumstances it would not be strange if those who speak as jurists, whether on the bench or in private station, desiring to avoid the charge of being themselves revolutionists, should follow the well-beaten track of Marshall, Story, Webster and others attempting to "escape history" and, instead of recognizing a new location of sovereign power, as by a revolution, should endeavor to persuade themselves and other people that this had always been the political fact.

It may be also anticipated that, under the same circumstances, the disposition to construe any written Constitution according to one's subjective views of political expediency will be likely to divert the jurist from the proper objective recognition of existing political facts. This disposition, the existence of which is unavoidable, has always been more or less traceable in our juridical literature, and the more visibly when unprecedented events have called for new ap-

[1] *Ante*, pp. 342–345.

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plications of the fundamental laws, — applications which may be called either innovations or conservative measures according to the political theory by which they are tested.

There can be no need to refer particularly to any judicial opinions pronounced during the last twenty years, or any earlier period of our history, as illustrating this.

This same disposition might be indulged even to the extent of inducing some jurists to fancy that they should, of themselves and aside from the evidence in the opinion of the general public, recognize in certain events a political revolution, a change in the location of sovereign power, if in their individual view of political expediency such a revolution should seem to be called for as a benefit to the nation or to maintain national life.[1]

But any person who may support a supposed investiture of sovereignty, either by a false citation of the historical record, or by making his own political predilections the criterion of the legitimacy or of the existence of political changes, would, instead of avoiding the recognition of revolution, make himself one of the instruments for effecting it.

In the lectures already referred to,[2] entitled "Revolution and Reconstruction," p. 9, Judge Parker said, —

[1] It had been so common for Americans to speak of "the right of revolution" (see *ante*, p. 189, note) that the action of the Government in forcibly resisting secession seemed inconsistent to some foreign observers. (See *ante*, p. 154, note.) Successful revolution originates legal rights, whether it is morally justifiable or not. Arguments against the validity of the secession ordinances founded on moral considerations may be found in many judicial opinions, and it might be inferred from their language that some of our judges and text-writers think that the revolution of 1776 would not have been followed by the consequences of successful revolution unless it could be held justifiable as resistance to illegal action of the Crown and Parliament. Compare Cooley's Principles of Const. Law, p. 25. This habit of thought might lead to juristical discovery of political change, founded on individual views of political expediency.

[2] *Ante*, p. 268, note 2.

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Judge Parker on revolutionary Construction.

"I shrink from revolution, masked under the cover of an assumed constitutional authority derived from false constructions of the Constitution; . . . and more especially do I look with dread to the future when we have entered upon such a revolution, not with the honest confession that it is a revolution we are seeking, that we are exercising powers aside from and beyond the Constitution and endeavoring to change the powers of the Government by a resort to measures which the Constitution does not authorize; but instead thereof are attempting to give the cloak of constitutional authority to the adoption of such measures by most unwarrantable constructions of the fundamental law, — constructions which pervert its meaning, and render it no longer a safeguard against despotic power."

I have hereinbefore argued that the political measures which Judge Parker was opposing might, as a whole, be sustained because, under the true theory of our national existence, the so-called "Confederate States" had ceased to be *States*, that is, political members of the Union. But if the various other theories upon which these measures had been based by their different advocates at that time have no historical foundation in our public law, Judge Parker was sufficiently justified in denouncing them as revolutionary.[1]

When revolutions are accomplished facts there is no use in shrinking from them; at any rate, it is impossible to get out of their way, however distasteful they may be. But if Judge Parker thought that this way of effecting a revolution, through juristical perversion of history and political construction of written law, was not, on

[1] Judge Parker in this place refers to a lecture delivered by the Bussey professor, Judge Emory Washburn, closing the previous term of the Harvard Law School, entitled "The Duty of the Profession to the Times," which Judge Parker appears to have understood as teaching that a reorganization of the government of the country was to be sought for by means of new constructions and interpretations of the written Constitution by that portion of the community which had received legal training. The portion of the lecture by Judge Washburn referred to is printed in the Monthly Law Reporter, July, 1864, p. 481.

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the whole, as easy or economical a way as the ordinary method, by sheer force, he might naturally say that he shrank from the prospect offered by attempting to bring it about in that manner.

There is reason enough for thinking it a poor way; for the attempt, by escaping history in this manner, had been going on ever since the Constitution was adopted; while the courts and the profession, to say nothing of the country at large, had always been in disagreement, before "the great point of the debate," as to the location of sovereign power, came "to be referred to the arbitrament of battle." [1]

But, as already intimated, there may be much reason to think that this theory or doctrine — that sovereignty is now vested in the nation as a mass of so many millions of persons — is now so "overwhelmingly" asserted by the general public, independently of all such juristical engineering, that, on the principle already stated, it must now be accepted for political truth, whatever history before the war may declare.[2] It will therefore be now necessary that the general Government should recognize it by taking the position of being the sole representative of sovereignty known to our public law, — a position which, being once fully established, makes the name of "national Government" an eminently proper designation.[3]

[1] *Ante*, p. 89. And now those who say that it has been decided by that "arbitrament" are no more in harmony as to the decision than they had been as to the issue to be decided, Mr. G. T. Curtis holding that the division of sovereignty between the States and the Government has been established, while Mr. Pomeroy and Mr. Jameson hold that it is the unitary possession of sovereignty, each assuming his own theory established by the military success which, of itself, proves nothing whatever. *Ante*, pp. 3, 4.

[2] *Ante*, p. 348.

[3] In my earlier work, Law of Freedom and Bondage, i, p. 408, the term "national Government" was preferred, not as indicating that the Government was superior to the States, according to the idea above described, but because, in acting through that Government for common ends, the States, united, constituted a nation. In the preceding pages of this essay the term

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But if this position of the general or national Government, instead of being merely the continuance of its former relation to the States and the people, has been the result of a political revolution, the judiciary of the whole country, and all who apply the Constitution as written law, may be obliged to disregard much that had formerly been affirmed, in the Supreme Court and elsewhere, as to the recognition of the text of the Constitution, and still more as to its construction and interpretation.[1]

It is therefore not improper to inquire whether the Supreme Court, especially, has indicated any conception of a new relation between the general Government and the States, as founded on new political conditions; relying on the history of the present, so to speak, and no longer looking for guidance to that of the past.

In its application by courts of law, any written Constitution is like a statute. An existing text, or form of words, is to be recognized in the first instance, and afterwards this text is to be explained or construed in its application to legal relations.

These questions, therefore, are always proper: —

1. How will the court recognize future changes in this written law?

2. By what canons will the court construe or interpret its provisions?

"general Government" has been employed with the wish to avoid any suggestion of political preference which might be attributed to using either the term "national" or the term "federal."

[1] "Among those who profess to be the special advocates of national rights are also persons of extreme views, some of whom contend that the nation is to be considered the fountain and source of all sovereignty, and that the States are emanations from it, — a view that would change radically the rules of constitutional construction which the courts have laid down." Cooley's El. of Const. Law, p. 34.. I had (*ante*, p. 114, note) classed this author with those to whom he refers in this passage, judging from his argument in Constitutional Limitations, pp. 5, 6; but from the more recent work, it may be inferred that he adheres to the theory of a division of sovereignty, as in the citation from the same book, *ante*, p. 106, note.

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Possible Extent of Change by Amendments.

As to the first inquiry, it must here be assumed that, whatever political change may have hitherto occurred, no variation in the letter of the Constitution will be recognized in any court of law unless found in some Amendment supposed by the court to have been adopted in the manner provided in the existing Constitution.

If the theory under which the Constitution is the record of a treaty or compact between independent sovereigns[1] is excluded, there would appear to be no limit assignable for the possible alteration of the written Constitution by Amendments. Under any other view it always would be supposable that the States by the action of three fourths of their number might grant or surrender to the general Government all the powers over their citizens originally spoken of as "reserved" to themselves,[2] and thus cease to exist politically as the sources of law and government, continuing, perhaps, as geographical districts in an elective system for maintaining the *personnel* of the national Government under a law of Congress.

Even under the theory that the States in union had been the autonomic source of power,[3] no such transfer of political rights by Amendments could be called revolutionary in the ordinary sense,[4] supposing each State to have acted freely.

[1] *Ante*, pp. 99, 100.

[2] According to the view hereinbefore expressed (ch. iv.), the States, in union, "reserved" these powers, as possessing them before. It has been growing more and more common to use the phrase — "reserved to the States by the Constitution" — as if "reserved" was equivalent to *granted* or *assigned* by the act of somebody superior to the States, who might be the hypothetical "people" or "nation." (*Ante*, p. 114.) As already contended (*ante*, p. 119), no powers could be *granted* or *surrendered* by the States to the general Government, because the latter had no independent existence. It could hold power only by *delegation*. (*Ante*, p. 131.) But if this Government is now capable of making its own existence its moral end, as representative of "the people" or the nation as a mass, its powers are no longer *delegated*, but belong to it by right of possession above law.

[3] *Ante*, pp. 139, 140.

[4] No government continues without more or less constant alteration.

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It may always have been matter of doubt, under any theory, whether the actual adoption of any Amendment can be passed upon by the judiciary, if the question should be raised in a case at law depending on the effect of such Amendment; that is, whether, under any theory, the Supreme Court could refuse to recognize, as an Amendment, provisions which had been declared by another department to have been actually adopted according to the terms of the constitutional requirements.

It was hereinbefore contended that the question of the existence or non-existence of a State or States of the Union, to be counted among the whole number of which three fourths may adopt an Amendment, must be purely political and beyond the cognizance of the judiciary.[1] But though this be admitted, still the judiciary may occupy a different position as to the question whether an *existing* State of the Union had or had not exerted a power, regulated by the Constitution *as law*, to maintain which, as law, all the States are concerned.

The only indications of opinion, bearing on this inquiry, given by the Supreme Court are those in some of the cases already cited,[2] in which it appears to have been the intention of the judges to leave the question of the actual

Burke said, "A state without the means of some change is without the means of its conservation." Some transmission of sovereignty is always going on. But, as I understand the term, a "revolution" which nobody knows anything of is, by definition, no revolution. Mr. Jameson distinguishes revolutions of three classes, the third being "such as are consummated quietly, without a breach of the peace or even excitement, often without a distinct perception on the part of the people of their occurrence" (Const. Conv. p. 101), which is a singular definition, considering the author's theory that "the people" are the sovereign, if revolution involves disturbance of sovereignty. The revolution which I have supposed possible is, on the contrary, to be proved, if at all, by the conscious recognition of "the people"; not one to be displayed by juristical legerdemain, or the process dreaded by Judge Parker (*ante*, p. 360).

[1] *Ante*, p. 284.

[2] Georgia *v.* Stanton, 6 Wall. 50, *ante*, p. 213; White *v.* Hart, 13 Wall. 649, *ante*, p. 19.

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adoption of an Amendment entirely to the discretion of some other department of the general Government, as being a political question as distinguished from a legal one.

It may be said that each judge, in accepting his commission from the executive, under the laws of Congress, recognizes that the existence of the Constitution, as a political question, is settled for him by the action of the other functionaries of the Government as a "political department." From this it might be argued that the existence of an Amendment, as part of that Constitution, must be equally a political question, and that as such it is equally determined for each member of the judiciary by such "political department."

On the other hand, it may be said that the adoption of an Amendment takes place under the Constitution itself, *as law;* that the Amendment, therefore, differs, as to the conditions of its first recognition by the courts, from the previous recognition, by each justice individually, of the Constitution as political fact. This consideration might appear to bring the question of its adoption within the sphere of judicial cognizance, if the rights or duties depending upon its existence as law should be brought in question by a legal controversy.

The case may be supposed that it should be perfectly well known that among the three fourths reckoned by the "political department" as having adopted a proposed Amendment there were some States which had not been equally free with the others in accepting or rejecting such Amendment.[1] But whether the judiciary, by receiving the testi-

[1] "The three constitutional Amendments . . . were adopted by the concurrent action of the great body of good citizens who maintained the authority of the National Government and the integrity and perpetuity of the Union at such a cost of treasure and life, as a wise and necessary embodiment of the just results of the war. The people of the former slaveholding States accepted these results," etc. President Hayes's Second Annual Message, Dec. 2, 1878. Macpherson's Handbook for 1880, p. 8. From this

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mony of another department as conclusive in that instance, could be thought to have individually sanctioned a revolutionary usurpation depends mainly upon the theory of our national existence which may be recognized.

For, whatever inference might be drawn from any other theory, the States could not be entirely autonomic in the adoption of Amendments under that theory which makes all the capacities of a State of the United States an exercise of rights under a law prescribed by the sovereign nation or people, immediately represented by a supreme national government.[1] It would seem that the State's faculty of action in respect to the acceptance of any Amendment proposed by Congress would, under such a theory, have also some of the characteristics of a duty, which would at the same time imply the co-existence of a power in some other hands to enforce it as such.

The question of the actual adoption of an Amendment by any one or more States never having been raised in the courts, it will be matter of conjecture upon what theory the judges may confide in the "political department" for knowledge of the action of three fourths of the States. In the absence of decisions, the topic is so far only political, in distinction from legal, that as yet it has hardly been brought by text-writers within the sphere of constitutional jurisprudence. But as the matter now stands, a juristical prognostication on this subject may be worthy of consideration on account of its political significance.

In "The Constitutional Convention" § 83, Mr. Jameson has observed, —

language it would naturally be inferred that the Southern States were not estimated in the adoption of these Amendments, and also that it is proper for "the political department" to distinguish, by their opinions on the subject matter of the Amendments, certain "good citizens" as the proper authority for adopting such Amendments.

[1] Compare *ante*, p. 350.

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A Suggestion by Mr. Jameson.

"But it is not enough that a Constitution provide a mode for effecting its own amendment; it is necessary that there should be developed a political conscience, impelling to make amendments in the written Constitution when such as are really important have evolved themselves in the Constitution as a fact. Our courts can, in general, recognize no law as fundamental which has not been transcribed into the book of the Constitution. When great historical movements, like those which have lately convulsed the United States, have resulted in important political changes, that are so consummated and settled as to indicate a solid foundation in the actual Constitution, they should be immediately registered by the proper authority among the fundamental laws. Why embarrass the courts and fly in the face of destiny by refusing to recognize accomplished facts? A point of honor should in such cases be cultivated, compelling the citizen to acquiesce in the decrees of the Almighty as written in events, similar to that which forces an English minister, on an adverse division upon an important measure, to resign his office. If political self-abnegation cannot, under written Constitutions, be developed to the extent indicated, it may be laid down as certain that no commonwealth governed by such a Constitution can long survive."

It may well be said that no commonwealth has ever survived the cultivation of a point of honor which is simply a surrender of individual opinion, by one set of citizens, on the demand of another set of citizens. It used to be thought that the main object of written constitutions was to prevent anybody, whether in or out of office, from requiring "political self-abnegation" of his fellow-citizens in the names of destiny and of the decrees of the Almighty.

On reading language of this sort in works dealing with the foundations of republican institutions, it is worth our while to remember that "great historical movements like those which have lately convulsed the United States" naturally produce in all minds some exaltation of the imaginative at the expense of the reasoning powers.

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Question of a Rule of Construction.

The next subject of inquiry — viz., By what canons will the court now construe or interpret the actual provisions of the Constitution? — gives occasion for considerations which may seem more important only because their application is more immediately practical.

Arguing from the nature of courts of law in all civilized countries, it must be taken for granted that the rules for the construction of the written Constitution heretofore followed by the Supreme Court will continue to be recognized, unless modifications have become necessary in consequence of some revolutionary change.

The only question, then, is, Has the court already indicated a purpose to construe the written Constitution as if a revolution had taken place?

It was not, perhaps, to be expected that the recognition of anything like revolution should be even suggested in any of the conflicting opinions delivered in the cases cited in the earlier chapters. It is true that the main inquiry in those cases was, essentially, as to a political fact, that is, the existence or non-existence, as members of the Union, of certain States; and the conclusion to be drawn from the recognition, by all three branches of the Government, of the continued existence of those States has herein been presented as involving usurpation on the part of that Government, which may have been legitimated by a revolutionary change in the possession of sovereign power. But, considering the point of time at which those cases arose, it must be supposed that the several members of the court had not then thought of any such ground for justifying the action of the Government, but exercised their judicial function solely in view of what they supposed to have been the conditions of political existence before the war or before the era of reconstruction.

The decisions, therefore, which may possibly indicate judicial recognition of some investiture of political sov-

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ereignty as newly established since the close of the war must be sought in cases of somewhat later origin, also involving the powers of the general Government.

The cases which may naturally be first thought of as belonging to this class are those which have arisen under the application of the last three Amendments. But, for the reasons already given,[1] however wide-reaching may be the changes which these Amendments have made in the distribution of power between the general Government and the States, they could not, independently of possible questions as to the validity of their adoption,[2] be regarded as revolutionary in the ordinary sense of the word.

As has been herein already said, it is possible to conceive of such a delegation of political power by the States to the general Government, by means of Amendments, as would subject the entire written Constitution to a new rule of construction.[3] If the power of determining the elective franchise in each several State should be at any time given to Congress, the political peoples of the several States would thereby surrender their self-determining individual existence, and would cease to be what I have herein all along supposed them to have been from the era of their declaration of their independence, — possessors, in union, of sovereignty as a unit, forming, as States in union, a sovereign nation. On the other hand, the general Government, in acquiring by this change a self-determining and self-continuing existence, would become the essential sovereign.

It may be proper to inquire whether some recent decisions do not indicate that the court proposes hereafter to construe the Constitution with the new Amendments as if this change had already taken place, or were at least begun and now in progress, and in taking this course, proposes tc

[1] *Ante*, p. 363. [2] *Ante*, p. 288. [3] *Ante*, p. 368.

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rely either on the indications of these Amendments or on those of some recent political events.[1]

The cases which are here noticed in such inquiry are such as presented, —

1, A question arising immediately under one of these Amendments, or —

2, A question under some legislation of Congress founded on such an Amendment, or —

3, A question of power or jurisdiction not directly dependent upon any of these Amendments.

The earliest cases of the first class are the so-called Slaughter House Cases, 16 Wall. 36, where the question was of the power of the court, under the Fourteenth Amendment, as law, to control the action of the State in the matter of sanitary police.[2] Mr. Justice Miller, delivering the opinion of the majority, which was against giving such a construction to the Article, said (*ib.* 82) :—

"The adoption of the first eleven amendments to the Constitution, so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power.

[1] Hereafter, it may perhaps be necessary for writers on constitutional law to distinguish and class the decisions of the court, on some topics, as they may have been rendered either before or after the war and the era of reconstruction. If this should be the case, the term "reconstruction" must be taken in a wider sense than that in which it has been applicable to the eleven States of the Confederacy only. It should indicate a reorganization of the whole political dominion previously known to the world as the United States, being, in effect, equivalent to a revolution.

[2] Munn *v.* Illinois, 4 Otto, 113, is a case very similar to this in its connection with the Fourteenth Amendment. Waite, Ch. J., delivered the opinion of the court. Field, J., delivered a dissenting opinion, in which Strong, J., concurred.

In Minor *v.* Happersett, 21 Wall. 162, arising on a claim of Mrs. Virginia Minor, a citizen of Missouri, to be registered as a voter, — *Held*, that the right of suffrage was not necessarily one of the privileges or immunities of citizens before the adoption of the Fourteenth Amendment, and that it does not add to these privileges and immunities. It simply furnishes additional guaranty for the protection of such as the citizen already had. The right to vote is derived from the political authority of the State.

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And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the States and of the contiguous States for a determined resistance to the general Government.

"Unquestionably, this has given great force to the argument and added largely to the number of those who believe in the necessity of a strong National government. But, however pervading this sentiment, and however it may have contributed to the adoption of the Amendments we have been considering, we do not see in those Amendments any purpose to destroy the main features of the general system."

As far as I am aware, no member of the Supreme Court has taken these Amendments as indicating "a purpose to destroy the main features of the general system," or as being revolutionary in that sense, or in any degree more so than any other Amendments might be.[1] But whether a jurist sees such "purpose," in any Amendments whatever, must depend very much upon the idea he had adopted beforehand of "the main features of the general system."

A "purpose" implies the pre-existence of somebody who may have entertained it, and whose powers are such that his purposes are material. It is pertinent in a political inquiry to ask, Who is it that the court recognizes as having had the power and the purpose, whatever it may have been, which is to be sought in these or in any Amendments?

It might have given some political significance to these historical statements if the court had indicated who it is

[1] Some justices, however, have thought that, in supporting certain powers claimed under the new Amendments, the majority had given them a revolutionary construction. This appears from their dissenting from that construction on the ground that these Amendments are *not* in the nature of revolution. Compare the dissenting opinions by Field and Clifford, JJ., in *ex parte* Virginia, 10 Otto, 361, 368, 370. *Post*, p. 382.

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that wills that there should be any union at all, or desires its "perpetuity," or even its present continuance, and who it was that "discovered" the danger, and who must be trusted to take measures to avert it.

It would have increased the interest of students of public law in such judicial attempts at writing American history, if the members of the court which gave its high sanction to these expressions had, on this or on some other occasion, explained how, this "general Government" or this "Union" could come into existence, or continue to exist, otherwise than by "the capacity of the State organizations to combine and concentrate all the powers of the State and the contiguous States" for any purpose they might think proper, or how, when the States may cease to exercise this capacity for these ends, this Government proposes to maintain its existence or "the perpetuity of the Union."

If the court meant that this "capacity of the State organizations" was exhibited in the attempted secession of eleven States, it may be asked, How has the "danger" then "seen" been diminished by these Amendments? They do not make secession any more illegal or null than it was before. Nothing that has been said or done since 1861 has made the duty of the citizen of a seceding State one particle more clear, under any theory of our national existence which the Supreme Court may have advanced. The Amendments do not indicate anything of the sort; and in the opinion of the majority, their sole object or purpose was to carry out the policy of the emancipation of persons of negro race by the power assumed by the general Government during the war.

On this point it is said in the opinion (*ib.* 67): —

"The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of

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doubt as to their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, — the people of the States, — for additional guarantees of human rights; additional power to the Federal Government; additional restraints upon those of the States."

In their political bearing, these remarks suggest the questions, Who was it that, perceiving the necessity referred to, recurred to the great source of power in this country? and Who are "the people of the States" who put restraints upon the power of the States, if not the States themselves?[1]

But one may search in vain the records of the Supreme Court for answers to these questions. Although these Amendments were adopted but yesterday, by the action of three fourths of the States, the court here speaks of them as if they too, like the original Constitution, were of some supernatural origin — a manifestation of uncreated essence — now existent by their own intrinsic force, without the will of the States which were said to have "adopted" them.

Mr. Justice Bradley, in his dissenting opinion, made a somewhat different reference to recent history, as giving the true index to the construction of this Amendment. His statement is (*ib.* 123): —

"The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The

[1] In the words, "people of *the States*," there may be some intimation of a political superior who is not the nation as a mass. In Judge Swayne's dissenting opinion, "the public mind" appears as the source of the Amendments (*ib.* p. 128). In Judge Bradley's, it is "the national yearning" which "had a voice given" to it in the Amendment (*ib.* p. 123).

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amendment was an attempt to give a voice to the strong National yearning for that time and that condition of things in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil,[1] in the full enjoyment of every right and privilege belonging to the freeman, without fear of violence or molestation."

On p. 124 Mr. Justice Bradley remarks: —

"The great question is, What is the true construction of the amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in a question of this sort. The National will and the National interest are of far greater importance."

On reading such historical statements the inquiries occur, Who is this not-come-at-able somebody who is to remedy the mischief alluded to, or any other one? Who is it that decides that what Judge Bradley calls "the spirit of insubordination," etc., was a mischief at all, or who wills that there should be either free speech or anything else? and who is the person that can give or deny a voice to, or even feel, the "national yearning" spoken of? What right has a judge to know a national will and a national interest which has not been made known through the States in union? In other words, who is the sovereign, if not the States which, as States in union, have given or withheld assent to these Amendments, as well as to the original Constitution?

In the same imaginative vein, Mr. Justice Swayne said in this case (*ib.* 128): —

"These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satis-

[1] Is the singular pronoun used to indicate that the soil is the soil of a unitary political body?

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fied that there was less danger of tyranny in the head than of anarchy and tyranny in the members."

In accordance with this metaphorical language, it must be supposed that it is this intellectual "head" which alone is cognizant of a "public mind," and that the States, being "members" to be directed by this "head," have no "mind" in the matter of a public mind.[1]

But this expression of this dissenting Justice is quite in harmony with other parts of his several opinion, in which he proposed to construe this Amendment simply by his own individual views of what the distribution of power under a Constitution ought to be; while, on the same page he remarks, "Our duty is to execute the law, not to make it." Mr. Justice Swayne said (*ib.* 129): —

"The power is beneficent in its nature and cannot be abused. It is such as should exist in every well-ordered system of polity. Where could it be more appropriately than in the hands to which it is confided? It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice, and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority, any government claiming to be national is glaringly defective."

May it be proper to suggest that this argument has a strong resemblance to reasoning in a circle? The matter in issue is, how far the individual rights of natural persons are entrusted to a certain government. If it be proper to call a government "national" only in the case that these rights have been entrusted to it, the claim to be "national" depends on the answer to the question

[1] In Mr. Justice Strong's opinion in Tennessee *v.* Davis, 10 Otto, 268, the States are presented as "members" of the general Government, — "the operations of the general Government may at any time be arrested at the will of one of its members."

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whether they have been so entrusted to it. The question cannot be decided by assuming the propriety of the name.

In these dissenting opinions, as also in the opinion of the court, it seems to be assumed that the rights referred to must necessarily be better protected if confided to one general government than they would be if entrusted to the States.[1] This is mere assumption. But, if correct, it should have no weight in a court of law; unless, indeed, the Supreme Court in the future is to determine, by the justices' private theories of political good and evil, the distribution of all political power, in which case a written constitution is quite superfluous.[2]

The opinion and decision of the court in these cases were sustained by five Justices against a minority of four, including Chief Justice Chase, who, however, did not deliver a separate opinion. Some passages in the dissenting opinions might be noticed as representing the basis of individual rights in this country as having been always derived from a law of general or national extent, and not from the local law of a colony or State (compare Field, J., 16 Wall. 104, 105; Bradley, J., *ib.* 112–120),— a view which it is, at least, difficult to sustain by history. Mr. Justice Swayne's opinion rests rather on the idea of a transfer, indicated in this Amendment, of all individual rights to a "national" law, that is, a law to be maintained by a "National" government.[3]

[1] *Ante*, p. 370. This is in accordance with ideas now prevalent, which are founded on recollections of the later history of slavery on this continent. It seems to be forgotten that, had the power over personal status been given to a general government at the formation of the Union, the abolition of slavery could not have taken place, as it did, by the separate action of one State after another until the free States became the majority. Had the power been otherwise located, a secession war might have originated in a quarter and from a motive quite opposite to those which were held responsible for the late civil war.

[2] Compare *ante*, p. 352.

[3] In the dissenting opinions the term "National," in the opinion of the court the term "Federal," is employed.

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I have noticed more particularly the opinions of the dissenting Justices in this case, as indicating their construction of the Constitution under a political theory, on account of the share which the same judges had in later cases, hereinafter to be noticed.

Among the cases of the second class as above distinguished, that is, the cases arising under the legislation of Congress based upon powers given by the new Amendments, the cases United States *v.* Reese, 2 Otto, 214, and United States *v.* Cruikshank, *ib.*, 543, are of some interest, although the constitutionality of the Act of Congress on which they were founded was not involved in the judgments.

The first of these cases arose on an indictment in the United States Courts, under Sections 3 and 4 of the so-called Enforcement Act,[1] against certain State inspectors of a municipal election in Kentucky for refusing to receive the vote of a colored citizen, under a dispute as to his payment of tax; that being a condition precedent required of all voters under the State law.

The second case arose under Sec. 6 of the same Act, on indictment in the United States Court for conspiracy in the State of Louisiana, in intimidating two persons, citizens of the United States, "of African descent, and persons of color," and preventing them from the enjoyment of certain rights.[2]

[1] Act of May 31, 1870, 16 U. S. Stat. 140, "An Act to enforce the Rights of Citizens of the United States."

[2] Chief Justice Waite, delivering the opinion of the court in this case (2 Otto, 550), when referring to the preamble of the Constitution, spoke of "the people of the United States" as having "ordained and established the government of the United States, and defined its powers by a constitution." The record referred to declares that it was the Constitution which was so ordained and established. The term "the government of the United States" is used only in Art. I. sect. 8, p. 18, — "powers vested by this Constitution in the," etc. The variation is significant as indicating the approaches to that theory which makes the written Constitution the law of

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The Virginia Cases.

In each of these cases the indictments, as framed, were held not sustainable under the Act of Congress.

Of greater importance among the cases of this class are the so-called West Virginia and Virginia cases.[1]

Strauder *v.* West Virginia, 10 Otto, 303, arose under Sec. 641 of the Revised Statutes[2] of the United States, providing for the removal of cases from the State courts to the courts of the United States, under certain circumstances. The court speaks of it as "an advanced step, fully warranted, we think, by the fifth section of the Fourteenth Amendment." The plaintiff in error, a colored man, had been indicted for murder, tried, convicted, and sentenced in the State court. The ground of removal was that "by virtue of the laws of West Virginia, no colored man was eligible to be a member of the grand jury or to

a sovereign government (comp. *ante*, pp. 342, 343), as distinguished from a law of a distinct sovereign of which that government is a subordinate instrument. It is in accordance with this that the judge says, "The government, thus established and defined, is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people," meaning, apparently, by "of," — *over* States and *over* people. The judge also speaks of "rights granted to the people by the Constitution," without distinguishing the people grantors from the people grantees. The Chief Justice in the same place indicates his acceptance of the divisibility of sovereignty, — "a citizenship which owes allegiance to two sovereignties, and claims protection from both." Adding, "The citizen cannot complain, because he has voluntarily submitted himself to such a form of government." This recalls some of the propositions in Chisholm *v.* Georgia, and shows that the doctrine of a social compact still has vitality.

[1] Decided, October Term, 1879. The majority opinions in these cases may be found in Macpherson's Handbook of Politics for 1880.

[2] Which declares that "when any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce, in the judicial tribunals of the State, or in the part of the State where such prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, ... such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts, and verified by oath, be removed before trial into the next circuit court, to be held in the district where it is pending."

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serve in a petit jury in the State." The Supreme Court held that the plaintiff's rights, under the Fourteenth Amendment, and under the statutes of the United States enacted to sustain that Amendment,[1] had been infringed, and reversed the judgments of the State courts. The opinion of the court was delivered by Mr. Justice Strong. Justices Clifford and Field dissented.

Virginia *v.* Rives, 10 Otto, 314, was also a case under Sec. 641 of the Revised Statutes, on the petition of the State for a writ of mandamus against Judge Rives, of the United States Circuit Court, to restore to the custody of the State court two colored men, who were under indictment for murder, and who were then held on *habeas corpus* from the Circuit Court. That writ had been granted on their petition, showing that the State court had overruled their first motion, — "that the *venire*, which was composed entirely of the white race, be modified so as to allow one third thereof to be composed of colored men," and that their application to the court and the prosecuting officers — that "a portion of the jury by which they were to be tried should be composed in part of competent jurors of their own race and color" — had been refused them.

The Supreme Court granted the mandamus, on the ground that the refusal of a mixed jury did not "amount to any denial of a right secured to them by any law providing for the equal rights of citizens of the United States." (*Ib.* 322.)

In the opinion of the court, by Mr. Justice Strong, it is, however, said: —

"It *is* a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there

[1] Sections 1977, 1978, of Rev. Stat.

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shall be no exclusion of his race, and no discrimination against them because of their color." (*Ib.* 322.)

It appears from the report that, in Virginia, there was no statutory limitation to white persons, of those liable to serve as jurors.

Justices Clifford and Field concurred in the judgment, but expressed in separate opinions the ground of their concurrence, as they did not agree with all the views expressed in the opinion of the court.

The distinction taken in this case is further indicated in the decision of *Ex parte* Virginia, 10 Otto, 339, a case arising under the Act of Congress commonly called the Civil Rights Bill,[1] in the constitutionality of which the whole merits of the case were, in the opinion of the court, involved. (*Ib.* 343.)

In the Supreme Court the decision was on the petition for a *habeas corpus*, and for the discharge of J. D. Coles, who was in custody under an indictment in the District Court of the United States, charged with having violated the provisions of the statute, by not having placed on the jury lists for the State and county courts any other than white persons, when acting as judge of the State county court.

The Supreme Court sustained the indictment as a proper one in form, or on its face, under the provisions of the statute, and affirmed the power of Congress to enact such a law under the clauses of the Fourteenth Article of

[1] An Act to protect all citizens in their civil and legal rights, 18 U. S. Stat., part 3, 336. Passed, March 1, 1875. The indictment in this case was under Sec. 4, enacting that "no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States or of any State, on account of race, color, or previous condition of servitude; and any officer or other person, charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars."

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Amendments,[1] and refused the petition for *habeas corpus*. Justices Clifford and Field, in an opinion delivered by the last, dissented (*ib.* 353), holding that the indictment was void on its face, and that the Act of Congress was not warranted by the Amendment.[2]

In these cases, the powers exerted by the legislature of the general Government were claimed solely on the grant of power made in the new Amendments. As already observed, no such grant of power can in itself be called revolutionary or an infringement of the political rights of the States. It was said by Mr. Justice Strong, in *Ex parte* Virginia, 10 Otto, 346 : —

"Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are, to a degree, restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be which the people of the States have by the Constitution of the United States empowered Congress to enact. . . . Every addition of power to the general government involves a corresponding diminution of the governmental powers of the States."[3]

[1] Article XIV. § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, and property, without due process of law, nor deny to any person the equal protection of the laws."

§ 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[2] The same opinion is given by these Justices as the ground for their dissent in Strauder *v.* West Virginia.

[3] Of interest in connection with the American political notions about "abstractions" (*ante*, p. 291), is Judge Strong's expression, "the abstract thing denominated a State" (*ib.* 347), when speaking of a State of the United States. Compare also *ante*, 319, note.

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It is from the same point of view that I here notice the opinions of the dissenting justices, Field and Clifford, in *Ex parte* Virginia. In the opinion written by Mr. Justice Field (10 Otto, 358), he observes: —

"Nothing, in my judgment, could have a greater tendency to destroy the independence and autonomy of the States, reduce them to a humiliating and degrading dependence upon the central government, engender constant irritation, and destroy that domestic tranquillity which it was one of the objects of the Constitution to insure, — than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the States in the discharge of their duties under State laws. It will be only another step in the same direction towards consolidation, when it assumes to exercise similar coercive authority over governors and legislators of States."

In the same opinion (*ib.* 361) it is said of the new Amendments: —

"Aside from the extinction of slavery and the declaration of citizenship, their provisions are merely prohibitory upon the States, and there is nothing in their language or purpose which indicates that they are to be construed or enforced in any way different from that adopted with reference to previous restraints upon the States. The provision authorizing Congress to enforce them by appropriate legislation does not enlarge their scope, nor confer any authority which would not have existed independently of it. No legislation would be appropriate which should contravene the express prohibitions upon Congress previously existing, as for instance, that it should not pass a bill of attainder, or an *ex post facto* law; nor would legislation be appropriate which should conflict with the implied prohibitions upon Congress. They are as obligatory as the express prohibitions. The Constitution, as already stated, contemplates the existence and independence of the States in all their reserved powers. If the States were destroyed, there could, of course be no United States. In the language of this court, in Collector *v.* Day, 'without them the general government itself would disappear from the family of nations.'"[1]

[1] Collector *v.* Day, 11 Wall. 120. In this case it was held that the salary of a judge of a State Probate Court could not be subject to the United States

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The Political Question here raised.

In the political relation in which all decisions and opinions of the Supreme Court are herein considered, the question is not whether these judgments are authorized by the letter of any one of the new Amendments; it is whether the construction, given to them generally, as grants of power to Congress, by the majority of the court, does or does not involve the recognition of a new investiture of sovereign power in this country, or the ascription of the written Constitution and all Amendments to a sovereign source of law different from that from which the Constitution and Amendments had proceeded before the war, whatever that source may have been.

In the Slaughter House Cases, the court intimates that the source of all such grants of power had always been the same, designating as such source "the people of the States." But in what sense these words are to be understood is as indeterminate in this instance as it had been in all instances of their use by the court's predecessors.[1]

As coming from a dissenting member of the court, the sentences last cited are more specially noticeable, in the political point of view, for the manner in which they present the written Constitution as the ultimate political fact upon which the existence of the States, as well as that of the general Government, depends. What Judge Field refers to as "prohibitions," "implied" in the Constitution, were

income tax. This has often since been cited in the Supreme Court for its recognition of the sovereign nature of the powers held by the States. In another point of view it may be taken as a contribution to the false political theory of divisibility of sovereignty, with the idea that the powers exercised by the general Government are not powers belonging to the States themselves, in their union; because now vested in a distinct political personality, called "the United States," but who, as far as the States are concerned, is in the position of a foreign or alien sovereignty. Mr. Justice Bradley delivered a brief dissenting opinion, founded on a view of our public law, which, in its application to this particular case, may be accepted, without recognizing the extension given to it by the same judge in some opinions to be cited on a later page.

[1] *Ante*, pp. 108–115, 312.

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really the political facts on which the Constitution rested for its authority as law; that is, the existence and independence of the States as possessors, in union, not only of "their reserved powers," but also of those powers which they had delegated to a common instrument, the so-called "government of the United States," existing under the law which they, in union, ordained and sustained. It had been these States which, in their union, were a member of the "family of nations," as they were before they constituted this general Government, which, of itself, is not now known in that family, and which had not been, as often miscalled, — the United States.[1]

In this fallacious reference to the nature of the Constitution, these sentences of the dissenting opinion are in accord with the general theory, supported by the majority of the court, of the subordination of the States to the central or general Government, claiming to be the sovereign, — the United States.

But Mr. Justice Field speaks more appositely to the true point of view when he proceeds to say, —

"Legislation could not, therefore, be appropriate which, under pretence of prohibiting a State from doing certain things, should tend to destroy it, or any of its essential attributes. . . . Indeed, the independence of a State consists in the independence of its legislative, executive, and judicial officers, through whom alone it acts. If this were not so, a State would cease to be a self-existing and an indestructible member of the Union, and would be brought to the level of a dependent municipal corporation, existing only with such powers as Congress might prescribe.

"I cannot think I am mistaken in saying that a change so radical in the relation between the Federal and State authorities, as would justify legislation interfering with the independent action of the different departments of the State governments, in all matters over which the States retain jurisdiction, was never contemplated by the recent amendments. The people in adopting them did not suppose

[1] *Ante*, pp. 303, 315.

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they were altering the fundamental theory of their dual system of governments." (*Ib.* 362.)

But, as already observed, it is still possible that a revolutionary change may have altered the fundamental theory referred to, even though it should not have been expressed in these Amendments; and the question still is, whether these decisions can be sustained otherwise than on the assumption of such a political change.[1]

Even more important than the cases last cited, in the relation in which the decisions of the Supreme Court are here referred to, that is, as indicating a political theory, are the cases which come under the third class, as above distinguished; in which are considered new claims of power by the general Government, not made on the basis of any grant of power in the recent Amendments.[2]

The so-called Maryland Election Case, *Ex parte* Siebold and others, 10 Otto, 371, comes within this description. It was presented in the Supreme Court on the petition of certain persons for *habeas corpus* and their discharge from imprisonment under the sentence of a Circuit Court of the United States. The petitioners, having been, under the State law, "judges of election," at an election in Baltimore in 1878, at which representatives to Congress were voted for, had been indicted in that Court under the law of Congress for having resisted the United States marshal and

[1] In a general connection with cases like the Slaughter House Cases, and with all the legislation based on the Fourteenth Amendment, attention may here be called to the preamble to the Act, Mar. 1, 1875 (*ante*, p. 880), — "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government, in all its dealings with the people, to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law; *Therefore*," etc.

This is indeed talking like a sovereign. The question occurs, When and how did a legislature, existing under the strict limitations of a law in a written Constitution, attain the position to "do it in Cambyses' vein"?

[2] *Ante*, p. 370.

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certain "supervisors" appointed by the United States circuit judge, when interfering in such election, as was, it was claimed, their right and duty to do under certain provisions of the Revised Statutes of the United States.[1]

Some of the parties so indicted were also held under sentence for the act popularly known as "stuffing the ballot-box," described in the indictment as "a certain act not then and there authorized by any law of the State of Maryland, and not authorized then and there by any law of the United States, by then and there fraudulently and clandestinely putting and placing in the ballot-box of the said precinct twenty (and more) ballots (within the intent and meaning of section 5514 of said statutes) which had had not been voted . . . contrary to section 5515 of said statutes, and against the peace, government, and dignity of the United States."[2]

[1] Rev. Stat. Title XXVI. "The Elective Franchise," sec. 2011. "The judge of the Circuit Court of the United States, wherein any city or town having upwards of twenty thousand inhabitants is situated, upon being informed by two citizens thereof, prior to any registration of voters for, or any election at which a Representative or Delegate in Congress is to be voted for, that it is their desire to have such registration or election guarded or scrutinized, shall open the circuit court at the most convenient point on the circuit." Sec. 2012. "The judge shall appoint two supervisors of election for every election district in such city or town." Secs. 2016, 2017, declare the duties and powers of such supervisors, and secs. 2021, 2022, those of marshals and their general and special deputies at such elections. These provisions were first enacted in the supplementary Act of Feb. 28, 1871, 16 U. S. Stat. 433.

[2] Secs. 5506 to 5515 inclusive, consist of provisions originally found in the Acts of May 31, 1870, and of February 28, 1871, and are included in the Revised Statutes under Title LXX. c. 7, under the name, "Crimes against the Elective Franchise and Civil Rights of Citizens." In the opinion of the court (10 Otto, 380) Sec. 5515 is given, which reads: "Every officer of an election at which any representative or delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States or of any State or Territory thereof; or who violates any duty so imposed, or who knowingly does any acts thereby unauthorized, with intent to

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In the so-called Ohio Election Case, *Ex parte* Clarke, 10 Otto, 399, it was said in the opinion of the court: —

"The principal question is whether Congress had constitutional power to enact a law for punishing a State officer of election for the violation of his duty under a State statute in reference to an election of a representative to Congress. As this question has been fully considered in the previous case, it is unnecessary to add anything further on the subject. Our opinion is, that Congress had constitutional power to enact the law; and that the cause of commitment was lawful and sufficient." *Ib.* 403.

It may be noticed that, in the indictments in the Maryland case, the actions of the State officers are charged only as violations of the statute law of the United States. The only allusion to State authority is in the allegation that the acts charged were "not authorized by any law of the State." The cases, therefore, are essentially different, and we know only from the above passage that the argument for the court's opinion in the first case was intended to apply as well to the second, in which case the petitioner, being a State officer of election at an election for a representative to Congress in the city of Cincinnati, had been convicted of a misdemeanor in the Circuit Court of the United States, under sec. 5515 of the Revised Statutes, for a violation of the law of Ohio in not conveying the ballot-box, after it had been sealed up and delivered to him for that purpose, to the county clerk, and for allowing it to be broken open.

affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such Representative or Delegate; or who witholds, conceals, or destroys any certificate of record so required by law respecting the election of any such Representative or Delegate, or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section fifty-five hundred and eleven."

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In each of these cases the Supreme Court sustained the judgment of the Circuit Court and refused the *habeas corpus*. Mr. Justice Bradley delivered the opinion of the majority in both cases; but the constitutional questions involved in the two cases were discussed principally in the opinion delivered in the Maryland case.

The dissenting opinion which was delivered by Mr. Justice Field, and in which Mr. Justice Clifford concurred, was more directly applicable to the question raised in the Ohio case, though given by them as defending their dissent in the other case also.

In the opinion of the court delivered in *Ex parte* Siebold, 10 Otto, 382, it is said: —

"These portions of the Revised Statutes are taken from the act commonly known as the Enforcement Act, approved May 31, 1870, and entitled 'An Act to enforce the right of citizens of the United States to vote in the several States of this Union and for other purposes,' and from the supplement to that Act, approved February 28, 1871. They relate to elections of members of the House of Representatives, and were an assertion on the part of Congress of a power to pass laws for regulating and superintending said elections, and for securing the purity thereof, and the rights of citizens to vote thereat peaceably and without molestation. It must be conceded to be a most important power and of a fundamental character. In the light of recent history and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary for the stability of our frame of government."

Although the court here speaks of these provisions as part of the "Enforcement Act," [1] and also refers to some

[1] In Macpherson's History of Reconstruction, the Act of Congress so designated is arranged in a chapter under the general heading, "Fifteenth Amendment; Votes on Ratification, Proclamation of Ratification, Bills enforcing and Votes thereon," p. 545. The Fifteenth Amendment reads: —

"SECT. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

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recent events as the occasion for the exercise of the power, it should be noticed that, in the same opinion, this particular legislation is not referred to any of the Amendments, but to a provision in the original Constitution itself.

As stated by the court (*ib.* 383), —

"The clause of the Constitution under which the power of Congress, as well as that of the State legislatures,[1] to regulate the elections of senators and representatives arises, is as follows: 'The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the place of choosing Senators.' "

While the court had thus stated the question for its decision as one of power, the position relied on by the petitioners' counsel rendered any argument of that question almost superfluous; and this seems to be the view taken by the court in this opinion. It being admitted, as it was as far as the merits of this particular case were concerned, that the word "regulations" was equivalent to the whole statutory law applicable to the exercise of the elective

"Sect. 2. The Congress shall have power to enforce this article by appropriate legislation."

It is evident that most of the sections of that Act are based entirely on the tenor of this Amendment, and it is highly probable that the northern public have taken these other provisions, referred to in these cases, as connected in some way or other with the same Amendment. Very few probably have ever thought of these provisions as based on an entirely distinct claim of power, and most persons have contemplated the Act as being "reconstruction" only as far as the States of the Confederacy were to be affected. Compare *ante*, pp. 235, n. 1, 370, n. 1.

[1] Even in this apparently simple introduction of the grant of power to Congress (Art. I. sect. iv.,) there is a foreshadowing of political doctrine which is nearly equivalent to a prejudging of the whole question. It is intimated that in the matter of elections of senators and representatives the State governments and Congress are equally dependent on a grant of power in the Constitution. It is evident that Congress, which exists under the Constitution, could have no power whatever unless specially granted in the Constitution by those, whoever they were, from whom it derives its authority. But it is equally evident that the States, whose existence was at least inde-

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franchise in such elections, and that Congress might at any time bring this within the sphere of its exclusive legislation,[1] there was little room for argument on the mere language of the Constitution. It is therefore mainly as containing political doctrine, extending beyond the exigency of this particular case, that this opinion is specially noticeable; and in this matter, even if judges could speak officially, their statements of history and their inferences from them are open to the criticism of all their fellow-citizens.

The petitioners' argument confined the range of the question to the co-operation of two governments. The court distinguished "special" and "general" reasons as having been urged against this co-operation, observing of the first (*ib.* 391), —

"We have thus gone over the principal reasons of a special character relied on by the petitioners for maintaining the general proposition for which they contend; namely, that in the regulation of elections for Representatives, the national and State governments cannot co-operate, but must act exclusively of each other; so that, if Congress assumes to regulate the subject at all, it must assume exclusive control of the whole subject."

After this the court proceeds to say, —

"The more general reason assigned, to wit, that the nature of sovereignty is such as to preclude the joint co-operation of two sov-

pendent of the Constitution, would have had the entire control of the matter, even though nothing had been said in the Constitution beyond providing that there should be a Senate and House of Representatives. In this instance, as in so many others in judicial opinions, the latent idea is that the States in union are what they are because there is a Constitution; while the fact has been that the Constitution was what it was because there were States in union. Compare *ante*, ch. IV.

[1] "The counsel for the petitioners, however, do not deny that Congress may, if it chooses, assume the entire regulation of the elections of Representatives." Opinion, 10 Otto, 382. This being admitted, and on saying, "In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner" (*ib.* 393), there was no need of saying more.

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ereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and State government in the election of Representatives. It is at most an argument *ab inconveniente*. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause in the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State."

This mention of "the joint co-operation of two sovereigns" recalls that supposed division of sovereignty which so many have thought exemplified in our polity.[1] In this particular application, the theory appears in a somewhat ludicrous light, where it is asserted in the same breath that in this action one sovereign is to be the instrument of the will and pleasure of the other. In the very next sentences the power of Congress is presented as "paramount," which makes the position of the other sovereign still more difficult of comprehension.[2]

The court proceeds to say, —

"If the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then the adoption by the State government of a system of regulations might exclude the action of Congress. By first taking jurisdiction of the subject, the State would acquire exclusive jurisdiction in virtue of a well-known principle applicable to courts having co-ordinate jurisdiction over the same matter.[3] But no such equality

[1] *Ante*, pp. 106, 295.

[2] Perhaps the petitioners' argument could be stated more correctly as urging that "co-operation" implies voluntary action by the two parties. The court's idea of co-operation might be likened to the co-operation of the cat and the monkey in pulling chestnuts from the fire. This may be "concurrent and harmonious action"; but where is the division of *sovereignty*? What is a sovereign cat's-paw?

[3] The idea of co-ordinate jurisdiction is excluded by the idea of sovereignty. One must be *aut Cæsar aut nullus*. The parallel suggested above is another illustration of looking at a political question from the lawyer's point

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exists in the present case. The power of Congress is paramount, and may be exercised at any time, and to any extent it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith."

In the earlier part of the same opinion (*ib.* 383), it had been said in regard to the clauses relating to this subject in the Constitution, —

"If not under the prepossession of some abstract theory of the relations between the States and the national Government, we should not have any difficulty in understanding them."

And it is equally true that there is a necessity for some "prepossession," whether acknowledged or not. In the opinion, the question is stated as if it were only one of the distribution of powers between the State governments and the general Government under the written Constitution as law. This was the immediate question. But if, in the argument, the construction of the clause is based entirely on a view of "the relations" referred to, the political "prepossession" of each judge joining in the opinion is essential to explain the force of the decision.

The court argues (*ib.* 387), —

"It is objected that Congress has no power to enforce State laws or to punish State officers, and especially has no power to punish them for violating the laws of their own State. As a general proposition, this is undoubtedly true; but when, in the performance of their functions, State officers are called upon to fulfil duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfilment? Yet that is the case here. It is the duty of the States to elect Representatives to Con-

of view, starting with a document to be interpreted (Comp. *ante*, p. 109, n. 3). The functions of the one *government* may be thought more dignified or more "national" than those of the other. But the two *governments* are alike in this respect, — that they are each instruments of a political superior, and in that view they stand on the same level. Brownson, Am. Rep. 254.

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gress. The due and fair election of these Representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of the election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, — State and national. A violation of duty is an offence against the United States, for which the offender is justly amenable to that government."

It depends entirely upon some political "prepossession" whether these propositions are not in flat contradiction to the Constitution, or at least a begging of the question. Under no theory of government known before the war were the State officials under any obligation to the general Government in their performance of their functions under the law of the State. Whatever may be the abstract truth as to the divisibility of sovereignty, it is certain that the plan of government was based on a distribution and separation of powers between two mutually independent agents, — the State governments and the general Government. Moreover, unless a revolution has taken place, it is not now, because it never had been before, "the duty of the States to elect representatives to Congress."[1] The only duties which the States owed, they owed as sovereigns owe duty; but not as corporations under law. The United States — not meaning, as in this opinion is implied, the general Government, but the *States in their union* — were morally bound to each other and to every human being under their dominion. But they were not, either collectively or individually, under any duty to a Congress, an executive and a judiciary existing as their own instrument of general government, under their law contained in the Constitution.[2]

[1] *Ante*, p. 305.

[2] Compare *ante*, ch. IV.

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"The due and fair election of these representatives is of vital importance to the United States," that is, to the States in their union, as the sovereign. It is so also to the United States, as meaning a country and its population, or to each inhabitant of the United States. But what its importance may be to the government which, in this opinion, is identified with the United States, to the exclusion of the States themselves, is something that has not yet appeared. For it is begging the question, as one under the Constitution as law, to say that the Government of the United States, meaning Congress, etc., is "concerned" as having power in the matter, or that it "is certainly not bound to stand by," etc. This Government, being only an agent and not a sovereign, has no concern in the determination of its own *personnel*, and is "bound" to do only what these States in union may have empowered it to do by the written instrument which rests upon their will, and not on the will of that Government.

That State officials should be responsible only to the State which appoints them may be a bad arrangement: and so may the whole "frame of government." But the persons who constitute the general Government have no responsibility for that. The servant must take his place as he finds it.

On page 393 it is said, in the opinion of the court, —

"The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify anything. But if we take a plain view of the words of the Constitution, and give them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

"The greatest difficulty in coming to a just conclusion arises from a mistaken notion with regard to the relations which subsist between

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the State and national governments. It seems to be often overlooked that a national Constitution has been adopted in this country establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority."

From the court's reliance, in the first paragraph, upon the "plain view of the words," etc., an intention to avoid any profundity, in the second, must be inferred. And every view of "the relation between the State and national governments" is superficial which assumes that these *governments* are the only persons concerned in the exercise of political powers, and is deceptive, also, if it presents them as two parties between whom sovereignty has been divided by a constitution assumed as self-existent law, and if it leaves out of view the fact that there must always be somebody in existence to whom its continuance from the time of its adoption is ascribable; who certainly is neither the "national" nor the State governments, separately or together. But this is what the court proposes to overlook, probably as being down in "the profound depths of speculation," and to present "the surface" view that, whatever the State *governments* may be, the general Government is a government in the sense of a sovereign personality, holding its powers by right of possession above law.[1]

[1] This assumption, which derives its plausibility from using the word "government" in two senses (*ante*, p. 802), is also the basis of the political expansion which Judge Story, in Book. III., ch. xi. of his Commentaries, had given for legitimate construction of the constitutional grant of power, of which he says, *ib.* sec. 816, "Its propriety rested upon this plain proposition, — that every government ought to contain in itself the means of its own preservation.

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The propositions upon which, in their general and sweeping application, the court here rests its decision, are not legal principles, but political doctrine. The court might have said that, with such a "prepossession of some abstract theory of the relations between the States and the general Government," it "could have no difficulty" in deciding any question of power. But the question remains whether such a "prepossession" is consistent with the continued political existence of the States in their union, and as to this every inhabitant of the land is called upon to have an opinion.[1]

Without disputing the correctness of a judgment of a court in a particular case, the language of its opinions may be open to criticism either for rhetoric or logic, as well as for political significance.

In concluding the opinion in this case it is said (10 Otto, 398), —

> If, in the Constitution, there were some departures from this principle (as it might be admitted there were), they were matters of regret, and dictated by a controlling moral or political necessity; and they ought not to be extended."

It never seems to have occurred to Judge Story that his regrets and views of what the Constitution ought to have been were not of the highest consequence in a professed interpretation of the Constitution. And what he has here assumed as the "principle" is in direct contradiction to the fact upon which the whole fabric was based, as shown by history. It is rather remarkable that the court in the opinion has made no reference to this chapter of the Commentaries. But, perhaps, such an exhibition of the possible extent of the claim of power might have seemed unpropitious to the allowance of the much more modest pretensions of the Acts of Congress.

[1] He may be called on to do more than have an opinion. His liberty and, perhaps, life, may depend upon the question, What opinion is the true opinion? In sec. 5522 of the Revised Statutes, among other acts declared criminal, it is mentioned that "every person . . . who refuses or neglects to aid and assist any supervisor of election or the marshal or his general or special deputies or either of them, in the performance of his or their duties, when required by him or them or either of them to give such aid and assistance, shall be liable to instant arrest without process, and shall be punished by imprisonment not more than two years, or by fine of not more than three thousand dollars, or by both such fine and imprisonment, and shall pay the cost of the prosecution."

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"In our judgment Congress had the power to vest the appointment of the supervisors in question in the circuit courts." [1]

"The doctrine laid down at the close of counsel's brief, that the State and national governments are co-ordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true.

"The true doctrine, as we conceive, is this: that while the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land; and when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle upon which the authority of the Constitution is based, and unless it be conceded in practice as well as in theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and continued existence of the States than to the continued existence of the United States as a government, to which every American citizen may look for security and protection in every part of the land."

It is probable that many readers will think there is nothing novel in this morsel of "true doctrine." So far as it is true, certainly, it is not new; but as far as it is new, it is either not true or has become so only recently. It is absurd to say that the authority of the Constitution is based on its authority. This is assuming a constitution existing by its own intrinsic force. That the Constitution and the *constitutional* laws of *the United States*, that is, that Constitution and those laws which derive their authority from the will of the States, sovereign in their political union, are the supreme law of the land, nobody ever disputed. If this is

[1] In the opinion (10 Otto, 885) it is said, by way of argument, "Where the subject-matter is of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive." Has the Supreme Court the faculty of determining the "national character" of powers as its means of construing the words of the Constitution? May it be inferred that this statute is a "uniform rule," which only operates at the discretion of any two citizens?

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the meaning of the court's language, still this summary of the opinion presents the same begging-the-question which attends the whole argument in detail.[1] But it is clear that "the United States," whose Constitution and laws are referred to in this passage, are not the *States* being united, but a hypothetical somebody, who is invisible behind the Congress, executive, and judiciary, at Washington. The name — The United States — is in this passage used to designate "a government" supposed to hold sovereign powers by grant or cession, as in its own political right, and to apply the Constitution as its law, or as expressing its own will, and not as the law on which it depends for its existence.

In the last sentences, as in so many other instances in earlier opinions, the States and the United States are presented as two distinct political personalities. But in this case the mention of the autonomy and existence of the States as cared for in an assumption by Congress to control the elective franchise, on the argument that it is a trust in the States for the benefit of a "national" Government, has somewhat the air of mockery.

But it is in the concluding words more especially that a novelty in doctrine may be intended, which is true only on the basis of revolution. It had been a mere truism that, so far as any American, whether called citizen or subject,

[1] Mr. Justice Field in his dissenting opinion (10 Otto, 420) remarked: "Much has been said, in argument, of the power of the general Government to enforce its own laws, and in so doing to preserve the peace, though it is not very apparent what pertinency the observations have to the questions involved before us. No one will deny that, in the powers granted to it, the general Government is supreme, and that, upon all subjects within their scope, it can make its authority respected and obeyed throughout the limits of the Republic; and that it can repress all disorders and disturbances which interfere with the enforcement of its laws. But I am unable to perceive in this fact, which all sensible men acknowledge, any cause for the exercise of ungranted power. The greater its lawful power, the greater the reason for not usurping more."

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may get any "security or protection," he must look to *the United States*, as the only possessors of sovereignty as a unit. Yet nothing in history is more apparent than the fact that his "security and protection" had not been confided to a general, central, or national *government;* and, if it is so now, it will not be because the existence of that government continues to be what it was, but because it has, by some revolutionary change, now become the only possessor of sovereignty, and because the name "United States" has become a misnomer.[1]

The opinion delivered by Field, J., in the Ohio case, in which Clifford, J., concurred, was given as supporting their dissent in both cases, but is chiefly directed to the question whether, in their execution of the State laws, the State officials can be subject to the jurisdiction of the Federal courts.[2] Only a few extracts, bearing most directly on the political question, can here be given.

"The act of Congress asserts a power inconsistent with, and subversive of, the independence of the States. The right to control their own officers, to prescribe the duties they shall perform, without the supervision or interference of any other authority, and the penalties to which they shall be subjected for a violation of duty is essential to that independence. . . . Indeed, a State could not be considered as independent in any matter with respect to which its officers, in the discharge of their duties, could be subjected to punishment by any external authority; nor in which its officers, in the execution of its laws, could be subject to the supervision and interference of others." *Ib* 409.

[1] At the first session of the Forty-sixth Congress a bill passed both Houses containing provisions repealing some of the sections of the Revised Statutes relating to elections, the constitutionality of which was discussed in these cases. President Hayes returned the bill with his objections in a message, May 29, 1879. His reasoning, defending the constitutionality of the sections in question, was not essentially different from that of the Supreme Court in the Maryland case, except in his more decided reference to "public opinion" as supporting such legislation. The history of the bill, with the message in full, is given in Macpherson's Handbook for 1880, p. 116.

[2] See extract from the opinion of this court in *ex parte* Clarke, *ante*, p. 387

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The following paragraphs from the same opinion have a more general bearing on the political situation of the general Government, seen in the light of this and other decisions.

"It is true that, since the recent amendments of the Constitution, there has been legislation asserting, as in the instance before us, a direct control over State officers, which previously was never supposed compatible with the independent existence of the States in their reserved powers. Much of that legislation has yet to be brought to the test of judicial examination; and, until the recent decisions in the Virginia cases, I could not have believed that the former carefully considered and repeated judgments of this court upon provisions of the Constitution, and upon the general character and purposes of that instrument, would have been disregarded and overruled. These decisions do, in my judgment, constitute a new departure. . . . In my judgment — and I say it without intending any disrespect to my associates — no such advance has ever before been made toward the conversion of our Federal system into a consolidated and centralized government. I cannot think that those who framed and advocated, and the States which adopted the amendments contemplated any such fundamental change in our theory of government as those decisions indicate." — 10 Otto, 413.

Further on in this opinion, Mr. Justice Field says of the clause in the Constitution relied upon in the argument to sustain the legislation in question, — it "does not, as it seems to me, give the slightest support to it," and proceeds to sustain his view by analysis of the provision, as of a statute, with the conclusion, —

"If this view be correct, there is no power in Congress, independently of all other considerations, to authorize the appointment of supervisors and other officers to superintend and interfere with the election of Representatives under the laws of Ohio and Maryland, or to annex a penalty to the violation of those laws, and the action of the circuit courts was without jurisdiction and void." — 10 Otto, 416.

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But, immediately after this, Judge Field states a proposition of a political nature, which, if admitted, may be taken to nullify all his preceding reasoning, being essentially the same doctrine as that upon which the majority opinion is constructed, and which amounts to this, — that the general Government does not exist for the benefit of the States in union, as its political superior, but that the States, in union, exist for the benefit of the general Government, as their political superior.

Judge Field, in continuation, argues: —

"The act of Congress in question was passed, as it seems to me, in disregard of the object of the constitutional provision. That was designed simply to give to the general Government the means of its own preservation against a possible dissolution, from the hostility of the States to the election of Representatives, or from their neglect to provide suitable means for holding such elections."

And to support this view the judge appeals to those unhappy ghosts — "the founders" — whom the majority of the court had already invoked, and who, though they had, while living, no authority to declare the meaning of the Constitution, have now the faculty of always giving testimony to suit any jurist who compliments them with a summons.

"This is evident from the language of its advocates, some of them members of the convention, when the Constitution was presented to the country for adoption. In commenting upon it in his report of the debates, Mr. Madison said that it was meant 'to give the national legislature a power not only to alter the provisions of the States, but to make regulations, *in case the States should fail or refuse altogether.*' — Elliott's Debates, 402. And in the Virginia convention, called to consider the Constitution, he observed, 'It was found impossible to fix the time, place, and manner of the election of representatives in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the State governments, as being best acquainted with the situation of the people

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subject to the control of the general government, in order to enable it to *produce uniformity and prevent its own dissolution.*' — 3 Elliott's Debates, 367. And, in the Federalist, Hamilton said that the propriety of the clause in question rested 'upon the evidence of the plain proposition that every government should contain in itself the means of its own preservation.' " — *Ib.* 416.

But this is precisely the assumption upon which the majority of the court has, in these cases, rested their construction of the grant in the constitutional provision. Judge Story, who, as has been shown, relies on the same assumption, also refers to these same authorities.[1]

"Nothing can be more evident," says Story (Comm., § 817), "than that an exclusive power in the State legislatures to regulate elections for the national Government would leave the existence of the Union entirely at their mercy. They could at any time annihilate it by neglecting to provide for the choice of persons to administer its affairs. . . . The Constitution ought to be safe from risks of this sort and against the temptation to undertake such a project." And, therefore, — is the argument of Judge Story, in the character of commentator, — the persons who

[1] Compare *ante*, p. 395, note. Madison and Hamilton, probably, conceived of an actual division of sovereignty between the States as separate political personalities, on the one hand, and a political somebody called "the United States," who, in possessing its share of sovereignty, was as distinct from the States as one sovereign country is from every other. They thought of the United States as one person, and of the States as so many others. Madison may have conceived of the States, as United States, holding power by grant from themselves separately. (Compare *ante*, p. 102, IV.) Hamilton, probably, thought that this grantee of power called "the United States" could only be *a government*, composed of persons holding executive, legislative, and judicial power as provided in the Constitution, and regarded this government as possessing a portion of all sovereignty by right above law. (Compare *ib.* V.) Story's theory (compare *ante*, 108, IX.) ignored the States as possessing independent political existence, and presented them in their united and separate relations as subordinate *governments* under a self-existent law contained in the written Constitution, the ultimate object of which was to keep up a general Government, and which was to be enforced by that government against the State governments in order to sustain its own existence.

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may at any one time have been chosen to administer the affairs of this "union" must have had the power given to them to provide for their successors in office. It may be asked, Suppose the case that the State governments had never acted in the first instance, where would this "national Government" have been to maintain its own existence as a government? Would Story's fetish constitution have made an executive, congress and judiciary, by its own force?[1]

Each State legislature must have been responsible to the political people of the State. But if the political peoples of the States did not choose to exercise their political power by the elective franchise, which, even when exercised for the purpose of keeping the general Government in existence, was a right dependent on the will of each several State, that government must have expired by its own limitations under the Constitution. Whether the State or States which so refused to exercise their political functions for maintaining the general Government would still be States of the union, or would lapse into territories under the exclusive jurisdiction of the States in union and maintaining the general Government, would have been a political question, not capable of settlement under the Constitution as law, and therefore not by the judicial functions of the general Government.[2]

That had been the political truth, on the supposition that, before the war, the States in union were the United States. But Judge Story's sagacity may have prepared a commentary to be justified in the future, by political revolution, which may now have been realized.

It depends entirely upon some political "prepossession" whether the title which this legislation has borne in the original enactment and in the Revised Statutes,[3] is not itself the assertion of a revolutionary change, or else, in

[1] Compare *ante*, p. 306. [2] Compare *ante*, p. 282. [3] *Ante*, pp. 885, 886.

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view of the written Constitution as law, equivalent to a begging the whole question. As the public law of this country had been before this legislation, it was solely as a citizen of a State, and from the exercise of the so-called "reserved" powers of a State, that any inhabitant of the United States had any "elective franchise." The word "citizen" was a word having two well-known, but distinct, meanings. So far as it signified a person holding that political right, or franchise, that sense was not included in the meaning of the term "citizen of the United States," whatever may have been the idea attached to that term. But that sense may or may not have been included in the meaning of the term "citizen of one of the States." The right to vote, even for President and members of Congress, belonged to any citizen only as he might be the citizen of one of the States.

For corroboration, if necessary, of this I refer to Mr. Pomeroy, as one of the most pronounced adherents of the theory that the Constitution rests on sovereignty held by the nation as a mass;[1] that the general government alone represents such nation, and that this inability of this government to create the electoral body, upon which its own continuance depends, is "an anomaly."

In § 207 of his "Introduction," etc.,[2] Mr. Pomeroy says: —

"Here we perceive that the general government has no voice in deciding who shall be privileged to vote for Representatives in Congress. The whole subject is controlled by State laws."

And in § 208, —

[1] *Ante*, p. 114.

[2] The citations are from the fourth edition, published 1879, the preface being that to the third, dated August, 1875. The author treats the subject at some length, §§ 205–216. That he has made no alteration of his text in consequence of the Fourteenth and Fifteenth Amendments appears from (Appendix) § 761, of the fourth edition.

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"This fact is a complete answer to the somewhat common notion that United States citizenship implies the right of voting. Nothing can be further from the truth. Not a vote is cast, from one end of the country to the other, by any person in virtue merely of his being a citizen of the United States."[1]

One may appeal to an author in the character of a jurist and expositor of constitutional law as it is, without being obliged to defer to his opinions as political philosopher, or guide as to what the constitutional law ought to be. In the course of his discussion of this subject Mr. Pomeroy says, § 211, —

"It is certainly, however, an anomaly that the general government of the United States should have no control over the choice of its own delegates in Congress; that it should be powerless to define the qualifications of congressional electors. It must be conceded that this is a defect in our organic law which needs amendment; it was an unnecessary and unfortunate concession to the theory of state sovereignty and independence. One code of rules should certainly prevail throughout the country to regulate the choice of representatives, and this should be the work of Congress, or of the people in its sovereign capacity. The nation should dictate in the selection of its own legislators. The integrity of the separate States is sufficiently guarded by allowing to each an equal voice in the Senate, and by permitting them to appoint Senators and to control the selection of Presidential electors; the more national branch of Congress, that which comes directly from the

[1] Mr. Pomeroy's note to § 209 is of special interest, as giving some indication of the author's conception of the theory of the Reconstruction measures. Referring to the exclusive power of the States over the elective franchise, he says, "I need hardly say that I am speaking here of those States alone which remained true to the Union, and which have voluntarily acted upon the question of suffrage. I do not include those States which attempted to secede, and upon which Congress is now imposing universal suffrage." He might have added, While Congress is at the same time "imposing" on them the exercise of their power, as States, to adopt Amendments binding on all the States. (*Ante*, p. 256, n.) As to State continuance, Mr. Pomeroy, in (Appendix) § 762, declares his agreement with Chief Justice Chase's doctrine, whatever that was, in Texas *v.* White. *Ante*, p. 9.

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people, should be entirely under the management of the one body politic which is represented in the general government." [1]

As I understand the word *anomaly*, it cannot be applied to a *fundamental fact*, or to a *condition* in the existence of anything which would not exist at all, if such fact or condition did not exist. A naturalist may think it "unfortunate and unnecessary" that the animals called quadrupeds have four legs, instead of having five or three, or that a dog wags his tail, instead of the tail's wagging the dog; but, as natural philosopher, he would hardly call these "anomalies." That Mr. Pomeroy, as Judge Story had found before him,[2] should find this fact in the political existence of the republic a very inconvenient one for his *a priori* theory of "a nation," is natural; but that does not make it "an anomaly." The fact is merely one in a connected array of facts which shows that sovereignty never has been held by the nation or people, as a mass, as Mr. Pomeroy and Judge Story assumed. The whole Constitution may be called "an anomaly" in view of the same theory.[3]

Whoever professes to expound a constitution, as jurist, should expound it as matter of existing fact, whether he likes the fact or not. As citizen, he may do what he can to change it, by argument; or by force, if he prefers; taking the responsibility, as John Brown did, with his musket at his shoulder.

If there are such persons as "delegates in Congress,"

[1] Compare *ante*, pp. 340–345, as to consequences of a supposed revolutionary change.

[2] See *ante*, p. 402.

[3] By the same theory, as presented by Falck, through Mr. Pomeroy (*ante*, p. 114, n.), all the governments that ever existed, or that can exist, were and will be anomalies. Mr. Bateman, in treating this subject very clearly and fully, as a question of revolutionary change, in his work on the Political and Constitutional Law, etc., on p. 250, has given special attention to Mr. Pomeroy's logic in this instance.

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they are certainly not delegates *of* Congress; not delegates of the body which, as delegates, they compose; much less can they be delegates of the government of which, as such body, they form a part. The author's theory blinds his perception of the fact that the provision which he calls "an unnecessary and unfortunate concession to the theory of state sovereignty and independence" could not be such a concession: simply because its existence as part of the Constitution depended on the will of those persons who held such "state sovereignty and independence," as the political peoples of States in Union; and that, if such persons had not chosen so to act, there would have been no "concession" and no constitution.[1]

The nation has always had "the choice of its own legislators." Because, except as there were States in union, to hold all the power of legislation that could be held, there was no nation. The House of Representatives is no more *national* than the Senate, or the President, or the judiciary; and all together, as the general Government, are no more national than the State governments, because all are equally necessary to a national existence.

Even the new Amendments have not changed this. If, merely in consequence of these Amendments, there is now a citizenship of the United States in a new sense of the term, the right to vote is not a characteristic of such citizenship.[2]

But the argument, in the opinion of the court in these Election cases, is founded on the assumption that, in vot-

[1] These fundamental facts were what Story was obliged to reconcile himself to, as "matters of regret, and dictated by a controlling moral or political necessity." *Ante*, p. 396, n. In the professor's argument, as in that of Story and so many other jurists, the Constitution is imagined as the cause of its own existence and continuance. Compare *ante*, p. 95.

[2] Probably there are some who have a different opinion on this point. For illustration, compare an article by Senator George F. Edmunds in North Am. Rev. for January, 1881, p. 26. Also *ante*, p. 246.

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ing for persons to make any representative government, the citizen exercises a power which that government must have a right to protect as if it were a right derived from that government.

This was one among the confused mixture of ideas brought out to support the Reconstruction measures, when "loyal" citizens, that is, citizens who were opposed to the secession of their own State, were to be discriminated as the proper constituents of the State, and, as such, to be maintained by the general Government in the exercise of the elective franchise for the benefit of such Government.[1]

In its historical associations, this legislation relative to the exercise of the elective franchise is part of the Reconstruction measures, and the construction of the constitutional provision by the court in these cases is founded on the same general theory upon which the whole Reconstruction policy of the Government was based: that is, that the Government, by the *necessity* of maintaining itself as a sovereign, must have the power to treat States *in the Union* as owing duties to itself, and that the fulfilment of such duties can at any time be enforced by the general Government, by its direct action upon the political people of the State.

The larger portion of the Reconstruction legislation has been popularly regarded as directed only to the circumstances of seceding and belligerent slave-holding States. But this part of that legislation, and the opinions of the Supreme Court in these cases, disclose the fact that the power exercised in those measures, if it existed, still exists, and exists without any reference to the previous political action of a State, and that the power to compel States in the Union to continue the existence of the general Government is logically and consistently regarded as one to be

[1] *Ante*, p. 252.

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employed at the discretion of the general Government against any and every State.

I have here noticed Mr. Pomeroy's development of his own political theory, in connection with the decisions of the Supreme Court in the Maryland and Ohio Election cases, because, taken together, they show the difference in political importance between all delegation of power to Congress (either in the original Constitution or an Amendment) over the private relations of the inhabitants of the country, including even those of personal *status*, and any which transfer to the general Government the power of determining the citizens who shall have the elective franchise.

While the States, severally, retain the power of determining their own existence as a political people, there may be States in union, acting by and through the general Government, as their agent, and the republic may rightly be called "the United States," though Congress may still exercise more and more of their powers.

But whenever the existing "anomaly," as Mr. Pomeroy calls it, is removed, and the general Government determines its own continuance, irrespectively of the will of the States in union, as the Supreme Court, substantially, claims it is its right to do, even now, the States, as political bodies, holding supreme power in union, will have ceased to exist, and have become municipal corporations, under a law, written more or less clearly in the Constitution, but dependent for authority on the will of the general or "national" Government.

The powers which the corporations, then called "States," will retain will not be sovereign powers; because all self-maintaining political existence will belong to a "National" government: and division of sovereignty is impossible.[1]

[1] It has been said of the English, "They have a form of government, but no constitution." When this change takes place, the same may be said of Americans. Congress will, essentially, be in the same position as is the Parliament.

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Of the same class of cases, that is, cases presenting new claims of power for the general Government as against the States, not founded on the new Amendments,[1] is the case of Tennessee *v.* Davis, 10 Otto, 257, decided by the Supreme Court, with the cases last cited, at the October Term, 1879. This case arose on the provisions of Sect. 643 of the Revised Statutes of the United States, which declare that —

"When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority, claimed by such officer or other person under any such law,[2] . . . the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit Court next to be holden in the district where the same is pending upon the petition of such defendant to said Circuit Court."[3]

In this case, the defendant, having been indicted in the State Court for murder, presented his petition to the United States Circuit Court for removal of the case, under this provision, into that court, alleging that the killing charged as murder was an act of self-defence, he being at the time

[1] *Ante*, p. 870.

[2] These clauses are taken from the Act of March 2, 1833, c. 57, sect. 3: 4 U. S. Statutes, 633. The history of this Act, passed during President Jackson's administration, is given in the opinion of the court, 10 Otto, 268.

[3] This extract from the statute is as given in the caption of the report. The passages omitted are — "or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law [this is from the Act of July, 1866, c. 184, sect. 67; 14 U. S. Stat. 171]; or is commenced against any officer of the United States or other person on account of any act done under the provisions of Title XXVI., 'The Elective Franchise,' or on account of any right, title, or authority claimed by said officer or other person under any of the said provisions." [This is from the Act of 28th February, 1871, c. 99, sect. 16; 16 U. S. Stat. 438.]

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engaged in the discharge of his duties as an officer in the United States revenue service. The case had thereupon been removed to the Circuit Court for trial of the issue raised by the indictment, and was presented in the Supreme Court, on the "certificate of division in opinion between the judges of the Circuit Court of the United States for the Middle District of Tennessee."

The court sustained the jurisdiction of the Circuit Court, and denied the petition to remand the case to the State court. Justices Clifford and Field dissented.

The opinion of the majority was delivered by Mr. Justice Strong. Independently of the question of the correctness of the judgment itself, this opinion may be considered so far as it is an exponent of political doctrine. With this object, some of the more striking portions are here noticed, with the preliminary admission that, so detached from the rest, they may give an insufficient view of the court's position.

After some introductory considerations the court presents this as the main question in the case (*Ib.* 262): —

> "Has the Constitution conferred upon Congress the power to authorize the removal from a State court to a Federal court of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein?"

Taken in connection with the succeeding portions of the opinion, this passage may be understood as intended to lay a foundation for the position, asserted afterwards, that the question of "guilty or not guilty" in this case was a question arising under the Constitution and laws of the United States, as distinguished from a question under the law of a State, and that *therefore* the case was one within the judicial power of the United States. But for this the

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court offers no argument: for the statement of the position is no argument, and this statement is contradicted in other parts of the opinion, where the issue raised in the case is expressly recognized as one to be determined by State law. It appears to be assumed by the court, without any evidence or allegation to that effect, that the issue, in the State court, of guilty or not guilty, would be identical with the question, whether the officer was doing a lawful act in executing the revenue law. It is evident that the case might have been decided in the State courts, on the facts, without the slightest question of the validity of the revenue laws, or of the powers of the revenue officers under them. There was therefore nothing in the case, as it stood, to warrant an assertion that "it *appears* that a Federal question or a claim to a Federal right is raised in the case and must be decided."

Here, at the outset, it is assumed, as it is indeed more plainly asserted afterwards, that the general Government may, or even should, treat each several State as unfriendly or hostile in exercising the powers which indisputably belong to it as "reserved" powers; and, further, that, for this reason, the general Government may take upon itself the judicial determination of any legal relations depending on those powers, when the persons who sustain those relations are persons having rights and duties under "Federal" law.

The court proceeds to say, —

"A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in Martin *v.* Hunter (1 Wheat. 363), 'the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be ar-

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rested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, — if their protection must be left to the action of the State court — the operations of the general government may at any time be arrested at the will of one of its members."[1]

In these sentences appears again that political doctrine which, taken as axiomatic, has been the foundation of some other opinions of the same court, — that the general Government is a government of that nature that it may or must, as a possessor of some sovereign powers, make its own existence its end, and employ any means it may think essential to that end. The citation from Marshall does not, however, support this, because it is therein recognized that, except as its powers may be constitutional, that is, intrusted to it by the law of a political superior, they are not powers of a government. In these sentences of the opinion, it is assumed that any power claimed by the Government in protecting itself *as sovereign* is "constitutional" power. Therefore, the position taken is that the power is not measured by the Constitution, but the Constitution is construed by the assumed power.

In these sentences of the opinion, something is again taken for granted which had not been shown by any record before the court, that is, that the act, the character of which the State proposed to judge by its own law, was an act warranted by "Federal authority."

But if this was the ground for asserting the jurisdiction of the United States Circuit Court as against the State Court, it was absurd for the Circuit Court to proceed to try the case as an issue of guilty or not guilty under the State law. The Supreme Court had made its decision on

[1] Compare a similar expression in Judge Swayne's opinion in the Slaughter House Cases, *ante*, p. 375.

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the question of removal, on the ground that the act in question was justified by the "Federal law."

The court proceeds to say, —

"The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer, not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if after trial and final judgment in the State Court the case can be brought into the United States Court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power is arrested."

Whatever legislation, on the part of a State, was possible was either constitutional or unconstitutional. If the latter, it was simply void *as law*. But if so unconstitutional and void as law, it could be made so to appear only through the decision of *cases* as they had arisen in the courts, and were, as cases, subject to the national judiciary. As political action, such legislation, so far as the general Government was concerned, was simply null; that is, the Government could take no notice of it as being either friendly or unfriendly.

This may have been an "element of weakness" in the Constitution, that is, a bad political arrangement. But neither the Supreme Court, nor any other branch of the general Government, had any right to give itself trouble on that account.

If, on the other hand, the State legislation was constitutional, it was for the general Government to keep its hands off; and all that the judiciary had to do was so to declare, whenever the question should arise in a case at law, whatever might be the consequences.

The court proceeds to enunciate as political doctrine: —

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"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States." [1]

Here, as in some other instances, the court allows itself to found an argument upon a misuse of words; that is, a use identifying the general Government with those States which, in their union, are the sovereign. In doing this it arrogates to the persons composing that government the character of sovereignty, and denies that character to the several States which in union are "the United States." [2] Whatever may be the record to be left by contemporaneous history, it was a misrepresentation of past history to say that this government had had any authority whatever, acting upon the States as its subjects.[3]

And in continuing: —

"While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

The passage here cited may seem commonplace enough; but it is itself contradictory to the position taken in the preceding sentences; for it is an admission that, like the State *governments*, the general *Government* is bound and limited by the Constitution, as law proceeding from some person or persons who are not identified with either of these *governments*.

In offering this truism as its solution, the court has here again, as once or twice before, simply begged the ques-

[1] See *ante*, p. 377, n. 2., Waite, Ch. J., in United States *v.* Cruikshank.
[2] Compare *ante*, p. 384.
[3] Compare *ante*, Ch. IV.

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tion, — whether the trial of a charge of murder, under the State's law in the case of a revenue officer, is withholding from the general Government "the cognizance committed to it by the Constitution." It is assumed that the enforcing of the simplest law of a State, — the law for the protection of the life of its inhabitants — is hostile, and in conflict with the use of powers granted to the Government by the States in union, so far as it may apply to officers of the general Government who may be within its territorial jurisdiction.

If the judiciary proposes only to carry into effect the Constitution *as law*, it is bound, as is every other branch of the Government, to take the law as given to it. But in this opinion the court virtually denies that the three branches of the general Government are under law. This it had done already by asserting that they, as a government, and "the United States" are one and the same personality, while the States are under a law administered by this Government. But the same idea is advanced in another part of the opinion, in which the court has produced an original conception at least, if it cannot, by the nature of things, be a discovery, by making the supremacy of the law, that is, of the author of the law, the supremacy of the agent.

After stating, *ib.* 263–265, its view of the extent of the judicial power, the court says, p. 265: —

"As we have already said, such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is also essential to a uniform and consistent administration of the national laws. It is required for the preservation of that supremacy which the Constitution gives to the general Government by declaring that the 'Constitution and laws of the United States made in pursuance thereof, and the treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound

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thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' "

It is not easy to see what force, as argument on the question before it, the court could find in this self-contradictory statement, unless it is understood as equivalent to saying that the general Government is identical with "the United States," that is, with the actual sovereign from whom the "Constitution and laws of the United States" proceed, and that, therefore, all its powers are original in itself, as the supreme law-giver, while all others, that is, those held by the States, are held under a law proceeding from those powers, the application of which is to be decided by the judicial function of this Government.[1]

The court next proposes to drag in "the founders," with their intentions, even to justify that *petitio principii* which characterizes this whole opinion: —

"The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, what protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the Constitution? If, whenever and wherever a case arises under the Constitution and laws or treaties of the United States, the national government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is, at least, temporarily silenced, instead of being at all times supreme."

Beyond this surmise as to the intention of "the founders" no argument is offered to show that a personal right, such as the right of self-defence, of "those who execute the laws of the Government," is one conferred by "its laws,"

[1] This is an illustration of the consequences which have been described (*ante*, pp. 341–348, 351, 352) as legitimately following from the theory of the Constitution's existing by the will of the nation as a mass, if made good by revolutionary change.

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or that their "protection" as citizens does not, under the Constitution, belong exclusively to the State. The contrary is indirectly affirmed by the admission, in the close of the opinion, that in the Federal Court the question of criminality must be decided by the State law.

Throughout this opinion, the court presents the divisibility of sovereignty as a fundamental truth: —

"The argument so much pressed upon us, that it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general Government the trial of prosecutions for alleged offences against the criminal laws of a State, even though the defence presents a case arising out of an Act of Congress, ignores entirely the dual character of our government. It assumes that the States are completely and in all respects sovereign. But when the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered, and vested in the United States."[1]

On page 271, after a review of decisions affirming the power to remove cases when a question arises of the validity of a right *given by a law of Congress*, the court says, —

"It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offences against State laws from State Courts to the Circuit Courts of the United States, when there arises a Federal question in them, is as ample as its power to authorize the removal of a civil case."

The citation of the cases to prove this proposition was entirely superfluous. Here, as throughout the opinion, the court assumes that the character of the act charged was to be judged by a "Federal" law, that is, a law deriving

[1] Why did not the court say, outright — to the Government? As shown in the fourth chapter (*ante*, p. 136), the United States were the grantors, so far as there were grantors, and not grantees. The idea of a "partial" *surrender* of an attribute of sovereignty is a new development in the theory of divisibility of powers.

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its force from the powers held by the general Government. But this was the proposition to be proved.

And then, on the same page, the court proceeds to contradict its own position, by asserting that the Circuit Court will try the case by the law of the State.

"The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress.[1] But they are unreal. . . . The Circuit Courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts.[2] The Constitution has made these courts within the States to administer the laws of the States in certain cases, and so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case."

Here, again, it is assumed that the Federal courts are within their jurisdiction in such instances, while immediately the court reasserts the divisibility of sovereignty, and speaks of the powers of the States as "sovereign":—

"The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, grows entirely out of the division of powers between that government and the government of a State; that is, a division of sovereignty over certain matters.[3] When this is understood (and it is time it should be), it will not appear strange that even in cases of criminal prosecutions for alleged offences against a State, in

[1] Here is another contradiction. If this *difficulty* is "real," that is, founded on the Constitution, Congress could do nothing about it.

[2] The whole argument had been that the States, and especially their courts, were to be regarded as foreign and hostile to the general Government. But how can one of two parties be *foreign* to the other, if this other is not equally foreign to the first?

[3] That is, apparently, that there is a division of sovereignty over one and the same subject, or class of relations, in harmony with the expression "partial sovereignty." (*Ante*, p. 418.)

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which arises a defence under United States law, the general government should take cognizance of the case, and try it in its own courts, according to its own forms of proceeding."

While, in this same opinion, the doctrine of the division or partition of sovereignty between the States and the general Government is proclaimed, it is almost in the same breath declared that any of these powers held by the States may at any time be subject, in exercise, to the other sovereign powers held by the general Government. If this can possibly be "understood," it is time somebody should explain. Why should not the court have done this service on this occasion, if the court understands it?

The dissenting opinion, written by Mr. Justice Clifford, occupying pp. 272–301, consists largely of citations from earlier decisions. But it was hardly worth so much trouble to prove a negative; considering that the proof of the affirmative proposition had fallen to the majority, and that their "opinion" exhibited only a logical failure.

In this dissenting opinion (*ib.* 281) it is said: —

"Neither the Constitution nor the Acts of Congress give a revenue officer or any other officer of the United States an immunity to commit murder in a State, or prohibit the State from executing its laws for the punishment of the offender. Unquestionable jurisdiction to try and punish offenders against the authority of the United States is conferred upon the circuit and district courts, but the acts of Congress give these courts no jurisdiction whatever of offences committed against the authority of a State. Criminal homicide, committed in a State, is an offence against the authority of the State. . . . Matters of fact are not in dispute. . . . Nobody before ever pretended that such an offence ever was or could be defined by an act of Congress as an offence against the Federal authority, — that the Circuit Court or any other Federal Court has or ever had any jurisdiction of such a case to try or sentence such an offender for such an offence."

Before the era of Reconstruction, it had been the will of the sovereign (*i.e.* of the States united), under whom

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all law existed in this country, that, in each State, the citizen should, in some relations, be bound by and receive protection from law proceeding from powers intrusted ["reserved"] to each State separately, and, in other relations, be bound by and receive protection from a law proceeding from powers intrusted [delegated] to a general Government.

The laws proceeding from the holder of either set of powers might be so framed, or, however framed, so administered, intentionally or unintentionally, as to work a failure of justice in relations dependent on those powers.

The persons who might suffer from such a failure of justice, in relations depending on one of these sets of powers, might be persons sustaining relations depending on the other set of powers.

The will of the sovereign, however, had been that the holders of these two sets of powers should be reciprocally independent in their use of these powers. The holder of neither set of powers had any right to interfere with the framing or the administration of the laws dependent on the action of the holder of the other powers.

Whether this was a good political arrangement, or not, was not a question for anybody but the sovereign to consider. For any one else, it was a speculative question; or was a practical question only as attempted revolution might make it so.

Sovereignty was distributed in exercise; it was not divided in possession.[1]

It was the same sovereign who held the powers "reserved" to the States separately, to be exercised by their governments, and the powers delegated to the general Government.

Hence, the latter could have no right to distrust the

[1] *Ante*, p. 189.

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State governments, as holders of power, much less have any "supremacy" over them.[1]

The citizen, under the laws of the State government, was under the protection and the obligations of laws derived from the only sovereign — the States united — as essentially as when under the laws of the general Government.

This was the fundamental fact; and the general Government had to accept the position in regard to each State government *as long as the State was a member of the Union.*

What consequences to a State would follow from a misuse of the powers "reserved" to it as a State of the Union, or what use should be considered a use inconsistent with its existence as a State of the United States, was a political question, which could not be decided by the exercise of any function of the general Government, as organized under the Constitution.[2]

This purely political question could be decided only by the sovereign, the person or persons holding sovereignty as a unit by right above law; that is, by the States, determining for themselves their own identity in union, mutually recognizing one another.[3] The general Government, as holder of delegated powers, could not, by its ordinary action under the Constitution, decide this question.[4] Its

[1] If either the general Government or the States could claim "supremacy" over the other, it would be strange that it should be that one which not only professed to be governed by a written law prescribed by the other, as a union, but which had no independent personal existence, being constantly dependent on the renewing action of that other.

[2] Unless, perhaps, a "political department" has been developed. Comp. *ante*, pp. 19, 65.

[3] As the original Thirteen had determined the question at the first. *Ante*, p. 283, n.

[4] In the case occurring in 1861, eleven States had so completely settled this by withdrawing their Senators and Representatives, to say nothing of other action, that, though the theory and its consequences were not then dis-

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action would commence when the political question had been decided against the continued existence of a State; when it became *territory* under the sole dominion of the (other) States continuing in their union.[1]

In all the cases which have been cited in this essay the Supreme Court construes the Constitution with the idea that sovereign powers are not so held, as a unit, by the States in union, and distributed to the State governments and a general government, but are divided; some, as sovereign powers, belonging to a general government (or a supposed "United States" or "Union"),[2] and others as sovereign powers also, belonging to the States severally.

According to the theory of our national existence maintained in this essay, there neither was nor could be, in the nature of things, a division of the powers of sovereignty, either between the State governments and the general Government, or between the United States (*i. e.*, the States united) and the States severally. All sovereignty was held, as a unit, by the States in union, — the United *States*.[3]

The essential importance of the distinction between such a *distribution* of sovereign powers, and a *division* of sovereignty (even in theory), appears in the arguments of the Supreme Court, in the cases cited in this chapter, for giving the possessor of one set of sovereign powers (the general Government, or a supposed "United States," or "Union") the right to control the administration of laws

cerned, the practical course taken was the same as if the other States, in convention, had formally declared that they only were the United States.

If the theory advanced in the Election Cases, *ante*, p. 385, that senators and members of the House are elected as members of a "National" government through suffrages controlled by the same government, is correct, it would seem to follow that the senators and representatives from the eleven States might have remained in the exercise of their functions until their terms had expired, even while the States from which they had been elected were declared belligerent States as against the government of which they were a part.

[1] *Ante*, p. 145. [2] *Ante*, p. 102. [3] *Ante*, p. 140.

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proceeding from the possessors of the other set of powers, — also, by the theory, sovereign powers, — the States.

Although it is evident that the argument, from the nature of sovereignty, applies just as much in favor of the powers held by the States, if they are sovereign powers, as in favor of those held by the general Government, it is in the cases here referred to assumed as a doctrine of constitutional law that the latter, in view of its own existence as sovereign, must assert the relations existing under its powers at the expense of every other possessor of powers equally sovereign, whenever the relations under each involve the same persons.[1]

The political doctrine declared by the court in justifying its decision in this case, Tennessee *v.* Davis, — that the general Government, as a superior, may, through laws of Congress, always interfere to prevent the administration of State laws by State Courts, in view of possible consequences to persons in the employ of the general Government, and of possible loss of their services, had no support in the history of this country before the Reconstruction era.[2]

Whatever else may be thought of the decision of the

[1] The toleration which this assumption has received is measurably ascribable to a popular idea that those attributes of sovereign rule which create legal relations over a wider expanse of territory, and such as are recognized in international transactions, are grander, more majestic, and more essentially *sovereign* than those which create such legal relations as exist in all communities, great or small, involving rights and obligations in respect to life, liberty, and property. An illustration of this may, I think, be found in Mr. Justice Bradley's argument for the supremacy of a "national" government in the Legal Tender Cases, 12 Wall. 555. (See *post*, p. 432.)

[2] If the personal rights to life, liberty, and property of officers of the general government are to rest upon laws enforceable as if they derived their authority from the "Federal" or "National" government, there is now an introduction, for the first time, into American jurisprudence of laws of personal extent, as opposed to laws of territorial extent, — a system which characterized Europe during the Middle Ages, and is now exemplified in the extra-territorial jurisdiction over foreigners of European race which is still maintained in Japan, China, etc

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court in this case, it, like others hereinbefore cited,[1] proves experimentally the futility of the theory of a division of sovereignty. In this opinion the theory is asserted, and "supremacy" at the same time claimed, for one of the supposed holders of sovereign power over the other in the exercise of his share of sovereign power.

From the opinions delivered in the cases cited in this chapter and others, also relating to the powers claimed by the general Government, some passages might be selected for notice in a political essay as making for that government those claims which I have pointed out as *indicia* of that theory which makes it the representative of the nation as a mass, instead of being the representative of the States united.[2]

But, without professing to have made an exhaustive examination of all the opinions bearing on our public law in the cases reported in the Supreme Court during the period in question, I think it is safe to say that, whatever inferences as to the future powers of the general Government may be drawn from the actual *judgments* of the court since the war, taken simply as *precedents*, or whatever expressions as to the position of that government, relatively to the States, may be found in the *opinions*, it will appear to any inquirer that no positive discrimination of a revolutionary political change has been made by any member of the court.

Even from the language of those justices who have gone the furthest in asserting the powers of the general Government as against the "reserved" powers of the States, it will probably be understood that, whatever political condition the Supreme Court may have accepted as the basis of its decision, they have in all their opinions stated it as one continuously existing from the time of the adoption of the Constitution in 1787.

[1] *Ante*, p. 301.

[2] *Ante*, pp. 341–345.

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This appears not only from their own several references to the original formation of the Government, and frequent appeals to the views or intentions of "the framers," but also from their reliance on earlier judicial opinions, and especially on some of Chief Justice Marshall's, as containing the political doctrine on which they rely.

The question presented in the Legal Tender Cases, 12 Wall. 457,[1] had no immediate connection with the public or private relations affected by the three Amendments. But the opinions delivered on the rendition of the judgment may be noticed in their bearing on the question of a possible revolutionary change, from the fact that the decision of the majority sustaining the powers claimed for Congress is, in the opinion of the court, and in Mr. Justice Bradley's separate opinion, based upon a political theory, without any reference to any clauses in the Constitution itself, as law, determining the powers of the general Government.

It was said in this case by Mr. Justice Strong, delivering the opinion of the court (12 Wall. 531), —

"Nor can it be questioned that when investigating the nature and existence of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction, applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it. In no other way can the intent of the framers be discovered."[2]

[1] Decided, December Term, 1870. The opinions given in these cases may also be found in Macpherson's Political Handbook for 1874, p. 40.

[2] It may be worth noticing that it is the "intent" or "purpose" of a known *person* that is sought in all *instruments*. There is no such thing as the intent of an instrument, of which we speak only figuratively. In ordinary instruments the intending person is always before the mind. The intent sought in the Constitution is the purpose of those who make it law *to-day*. The court speaks of it as one might of a testament left by "the framers,"

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"No single power is the ultimate end for which the Constitution was adopted. It [*i.e.*, the single power?] may in a very proper sense be treated as a means for the accomplishment of a subordinate object; but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or provide for and maintain a navy, are all instruments for the paramount object which was to establish a government sovereign within its sphere, with capability of self-preservation,[1] thereby forming a union more perfect than that which existed under the old confederacy."

After quoting Chief Justice Marshall's language, Mr. Justice Strong proceeds to say (*ib.* 533), —

"That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it the right to employ every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things, enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers of Congress and all other powers vested in the government of the United States, or in any department or officer thereof."

And in the same opinion (*ib.* 545), —

as if their individual intentions should operate when they were dead and gone; whereas "the framers" had no more authority in its adoption than any other citizens. Compare *ante*, p. 296.

[1] In the opening sentences of this opinion, 12 Wall. 529, this phrase occurs, — "a power possessed by every independent sovereignty other than the United States": *innuendo* that the Government and the United States are identical. That the United States, *i. e.*, the States in union, possess all the powers of any independent sovereignty, was the fact. The question was whether they had delegated one of these powers to the government existing under *their law*. These few words give the key to the whole decision, as is more clearly shown by Mr. Justice Bradley in his separate opinion, *post*, p. 431.

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"The Constitution was intended to frame a government, as distinguished from a league or compact; a government supreme in some particulars, over States and people."

Sentences of this sort may be found in many earlier as well as later opinions. To say that the government is not a league or compact, as framed by the Constitution, is a meaningless truism, unless it is implied that there was somebody, and is somebody now, in existence, who, by legislating in the Constitution, had placed the States, as well as the individual inhabitants of the States, under the jurisdiction of the general Government. Who this person may have been, or now is, is left to the imagination. Unless such person can be found, however, the Government cannot have any authority over States, as such, and they remain what they were at the beginning, — possessors, in their corporate capacity, of sovereignty in union.

So far as these expressions convey any consistent meaning, it is that, by some means or other, a government came into existence which was not merely the agent of a pre-existing and continuing possessor of sovereign power, but a government sovereign in itself, and entitled as such to maintain itself against all the world. In this instance, as in so many others, earlier and later, no recognition is made of an author of the Constitution to whose continuing personal existence and continuing will its authority as law should be ascribed. Powers are spoken of as "conferred by the Constitution." There is a recognition that the Constitution was "adopted," and that it was "intended." But who those were who so adopted and so intended is not specified, unless by the allusion to "the intent of the framers," who, whatever may have been their personal merits, had no more authority to give to the Constitution as law than the most obscure voter in their day.

This is nothing more than a stale presentation of the

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fetish constitution, supposed to operate of itself after having been once set a-going. In its search for the ultimate object of the Constitution as a means, the court stopped on reaching the Government. But the next question was, What was the object for creating that Government in the minds of those now living persons, whoever they may be, who *to-day* give to that Constitution all its authority ?[1]

The decision of this question of historical fact is beyond the power of any court of law whatever. Therefore, it does not give any argumentative force to such solutions of the political question to cite statements, equally weak and meaningless, which had been made by an earlier judge; even though that judge was the great lawyer and universally honored citizen, John Marshall.

After saying in the same opinion (*ib.* p. 533), "It was certainly intended to confer upon the Government the power of self-preservation,"[2] Mr. Justice Strong cites the language of Marshall, Ch. J., in Cohens *v.* The Bank of Virginia, 6 Wheat. 414.[3]

"America has chosen to be in many respects and to many purposes a nation, and for all these purposes her government is com-

[1] *Ante*, p. 296.

[2] The question is, What was the "self" that was to be preserved? A government which is an agent can have no right of *self*-preservation independently of the pre-existence of its principals.

[3] In this place Judge Marshall had said, "That the United States form, for many and most important purposes, a single nation has not yet been denied. [In this essay it is held that they form a single nation for all purposes.] In war we are one people. [How would the judge have explained the legislation founded on belligerency and conquest in civil war? *ante*, p. 175.] In making peace we are one people. [Or explained the reconstruction measures?] In all commercial regulations we are one and the same people. [Or the Slaughter House Cases?] In many other respects the American people are one, [One people? In what sense?] and the government which alone is capable of controlling and managing their interests in all these respects is the government of the Union. [In what sense of 'Union'? of agent for the United States or of government acting on the States?] It is their government, and in that sense they have no other. [To whom do 'their' and 'they' relate? To the States united, or 'the people'?] America has," etc., as above.

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plete; for all these objects it is supreme. It can, then, in affecting these objects, legitimately control all individuals or governments within the American territory." [1]

In a case where the essence of the decision was the discrimination of living political organisms, it was puerile rhetoric to use a term like "America," which has never had a political use. The question occurs, How can there be a nation which is a nation only for some purposes, and not for all? It was the States in their voluntary union which chose to be a nation for all purposes; and for this they had, as matter of fact, controlled all individuals, and all governments within their geographical American territory, including the general Government.

Mr. Justice Strong proceeds to cite further from Judge Marshall in the same case (6 Wheat. 387), as follows: —

"A constitution is framed for ages to come, and is designed to approach immortality as nearly as mortality can approach it. Its course cannot always be tranquil. It is exposed to storms and tempest, and its framers must have been unwise statesmen, indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it is sure to encounter."

"As far as its nature will permit" is an unfortunate qualification in a theory which elevates constitutions into the rank of sentient existences. The honored Chief Justice, in this deification of constitutions, had an advantage over

[1] Judge Marshall here adds, "The Constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. [There was no dispute about this.] These States are constituent parts of the United States. They are members of one great empire, [They were the United States, and they and 'the empire' were identical] for some purposes sovereign, for some purposes subordinate." [To whom?] They had in union laid down a law which was binding on the State governments and on the general Government; giving the judicial department of the latter the authority to apply this law in *cases* at law. But in this respect the general Government was as *subordinate* as were the State governments.

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his brethren of a later time, by living nearer to that generation over whom the French theories of the eighteenth century had such a power as to allow their belief in the possibility of such things.[1] But the court of our day, in the very act of quoting these words of its great predecessor, has had the sagacity to put living men in the place which he had ascribed to a piece of parchment. Even though it be also an assumption in this instance, this is an assumption more in accordance with the nature of things. It is "the Government" which, in the court's opinion, now appears as the self-existent being.

The language of Mr. Justice Bradley, in a separate opinion sustaining the decision of the majority, is still stronger than that in the opinion delivered by Mr. Justice Strong, for the Court, in relying on the political theory of a government supreme and self-supporting in its nature.

Judge Bradley remarked (12 Wall. 554), —

"The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It is called a government.[2] In the eighth section of Article I. it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, vested by this Constitution in *the Government of the United States*, or in any department or office thereof. As a government it was invested with all the attributes of sovereignty. It is expressly declared in Article VI. that the Constitution and the laws of the United States, made in pursuance thereof,

[1] *Ante*, p. 315. In this same case, 6 Wheat. 381, Judge Marshall said, "This is the authoritative language of the American people; and, if gentlemen please, of the American States." This passage exhibits the ultimate weak point of that school which may have been founded on this opinion. *A fact* is identified with an *hypothesis*, though the fact and the hypothesis contradict each other. Marshall could not help seeing that all law was traceable to the States in union, as fact; and yet here found a law to act on the States as "subordinate," proceeding from the people, as law-giver by hypothesis. Compare notes on pp. 111, 114.

[2] Compare Mr. Webster's "It is called a constitution." *Ante*, 96 n.

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and all treaties made under the authority of the United States, shall be the supreme law of the land.[1]

"The doctrine so long contended for"[2] . . .

"The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is vested with power over all the foreign relations of the country, war, — peace, and the negotiations and intercourse with other nations, all of which are forbidden to the State governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as[3]. . .

"Such being the character of the General government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions.[4] If this proposition be not true it certainly is true that the government of the United States has express authority, in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted and vindicating its authority and existence."

A plainer statement of the political doctrine by which

[1] Compare Mr. Justice Strong's argument from these words in Tennessee. Davis, *ante*, 416.

[2] The remainder of this paragraph from the opinion has already been cited, *ante*, p. 89, n. 2.

[3] Judge Bradley proceeds to describe these, and in doing this says (*ib.* 556), "And the Government is clothed with power to guarantee to every State a republican form of government, and to protect each of them against invasion and domestic violence." I think it is not mere verbal criticism to notice this novel presentation of the guaranty given by "the United States," in sect. 4 of Art. IV. (*ante*, p. 214, n.), as illustrating an existing tendency to ignore the political sovereign from which the Constitution proceeds, and the fact that the general Government is only an agent, and to substitute it as the only supreme power holder, which gives or withholds republican government at its pleasure. Compare *ante*, p. 342.

[4] If it has all the functions of any government it is superfluous to say that it has all the powers necessary for those functions. If its functions are limited, they must be so by some law. That law must have an author, or source. But if the government exists under such a law, it has not any of the attributes of sovereignty.

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this and later cases in the Supreme Court have been decided could not be desired, and the judge's fellow-citizens owe a debt of gratitude for such an outspoken utterance from the bench. As to the argument, the only possible answer would be that the general Government had not the character here described before 1861, and nobody had shown that it had acquired that character afterwards.

Judge Bradley, in continuing, says, —

"Another proposition equally clear is that, at the time the Constitution was adopted, it had for a long time been the practice of most, if not all civilized governments, to employ the public credit as a means of anticipating the national revenues for the purpose of enabling them to exercise their governmental functions, and to meet the various exigencies to which all nations are subject."

Here again the assumed parity of the general Government, under the Constitution as law, with any or all governments holding sovereignty by right above law, is the foundation of the argument, which is developed in a historical review of the political economy of the subject. (*Ib.* pp. 556–570.)

In the course of this (*ib.* p. 561), Judge Bradley introduces a proposition which, of itself, would settle everything, —

"The legislative department being the nation itself."[1]

With this for a fundamental fact, the written Constitution would appear *quasi* obsolete, and the future labors of the Supreme Court proportionately abbreviated.

Judge Bradley in the same place remarks, —

[1] In the House of Representatives, Jan. 8, 1867, in the debate on House Bill No. 543 (*ante*, p. 221, n.), Mr. Thaddeus Stevens said, "In this country the whole sovereignty rests with the people, and is exercised through their representatives in Congress assembled. The legislative power is the sole guardian of that sovereignty. No other branch of the government, no other department, no other officer of the government, possesses one single particle of the sovereignty of the nation." Cong. Globe, 2d Sess. 39th Cong., p. 252.

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Chase, Ch. J., dissenting in the Legal Tender Cases.

"The interests of every citizen are bound up with the fate of the government. None can claim exemption. If they cannot trust their government in its time of trial, they are not worthy to be its citizens."

Citizens, here, were not *citizens of the Government*, and the interest of citizens of the United States was not in the fate of the Government, as such; but only as its "trial" might involve the fate of their sovereign, from whom it derived all that made it a government. That sovereign was the States then remaining in a voluntary union. The Government was on trial; because it was questionable whether, as constituted, it was an adequate instrument for the needs of the sovereign at such a crisis. But if it took powers not belonging to it, as constituted, — because it was not able to answer those needs, otherwise, — then its trial proved it to be a failure.[1]

The position taken in these cases by the court was described in its political bearing by Chief Justice Chase, in his dissenting opinion (12 Wall. 582): —

"It is unnecessary to say that we reject wholly the doctrine advanced for the first time, we believe, in this court by the present majority, that the legislature has any powers under the Constitution which grow out of the aggregate of powers conferred upon the government or out of the sovereignty instituted by it.[2] If this proposition be admitted, and it be also admitted that the legislature is the sole judge of the necessity for the exercise of those powers, the government becomes, practically, absolute and unlimited."

The political theory indicated in the opinions of the several justices is here considered without any regard to the correctness of the judgment rendered in these cases. Much of the unfavorable criticism on this decision has been

[1] Compare *ante*, p. 201.

[2] If Judge Chase had ever recognized any "sovereignty" whatever as "instituted" by the Constitution, he had helped to build up the idea of a supreme or sovereign government, which was turned against him on this occasion.

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founded solely on an assumption that the maxim *Stare decisis* applies in cases involving political rights. For reasons already stated,[1] it may be urged that, when political powers are involved, the judgment of the Supreme Court in the particular case should be recognized as final, without accepting the grounds given for that single decision as conclusive on a doctrine of public law.

It must be clear that the general Government becomes "practically absolute and unlimited," just as truly when the judiciary, which is as much a part of that Government as "the legislature," is to be the "judge of the necessity for the exercise of those powers," to an extent beyond the determination of the rights and obligations of parties to the particular case presented for its judgment.

These cases in the Supreme Court are, like all earlier cases, a portion of the means of ascertaining what extent of power may be *legally* claimed for the several branches of the general or national Government. The discussion of this belongs to treatises on constitutional *law*, properly so called.

In an essay of a political character, the inquiry would not be whether these judgments are sustainable in view of the Constitution and Amendments, as written law, but rather, — assuming that they will be sustained, — what theory of the possession of sovereign power they indicate.

The question, then, is whether these judgments are sustainable under any other theory than that which substitutes the unitary sovereignty of the nation as a mass, represented by a national Government,[2] for the unitary sovereignty of the organized States in a voluntary union.

I shall not offer any opinion whether the language of any judge in these cases amounts to a declaration that this theory has now become true in consequence of events occurring since 1861. The meaning of the phrases now in

[1] *Ante*, p. 350.

[2] *Ante*, p. 356.

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use on the general subject, called in common parlance "the results of the war," is as yet too unsettled for a basis of such criticism, the question of revolution or no revolution never having been squarely stated.

But this at least is plain, that, so far as any argument to support any view of the *present* location of sovereign power may be based on history before 1861, it would be, *pro tanto*, inconsistent with the idea of basing it on anything occurring after that date; for, if this idea be adopted, the early history is entirely immaterial.

The value of all earlier judicial assertions of the origin of the Constitution of the United States in the will of the people or nation as a mass, in distinction from its origin in the will of the States united, when such assertions are compared with the historical record, has already been considered. It will hardly be contended that the iteration of such assertions, made by judges now on the bench, as to facts which occurred before they were born, must have a higher value, as testimony, than the assertions of their predecessors, for the reason that the newer statements are made after a civil war in which the Government had done no more than sustain itself in the possession of such powers only as it had previously held.

If any of the members of the court seem to say that a question as to what had happened before 1787 had been settled by something that had occurred since 1861, the absurdity of such language must be explained away by supposing them to have intended to say that a political event had occurred, after the later date, which made a theory true[1] *for the future* which a certain school of jurists

[1] The judgment in the so-called Legal Tender cases, at December term, 1870, was in opposition to the judgment on the same question in Hepburn *v.* Griswold, 8 Wall. 626, decided in conference, Nov. 27, 1869. But the conflict in these decisions could perhaps be explained on the supposition that, whereas the earlier had been made in view of a political theory which had been good enough up to a certain date, the later decision was rendered by a

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had professed to discover in the history of the last century.[1]

But such a political event could be found only in that action of the Government which, on the supposition of the continued existence of the eleven States of the Confederacy, was usurpation, as already contended.[2]

If, therefore, these decisions are sustained on the ground that sovereignty in this country is now vested in the nation as a mass, and not in the States in their voluntary union, it must be assumed that the court has recognized a revolutionary change since 1861, or proposes to assist in accomplishing such a change by the method of juristical construction deprecated by Judge Parker.[3]

majority of justices, some of whom recognized that a revolutionary change in the seat of sovereignty had taken place. The judgment in the earlier case had been sustained by five (Chase, Ch. J., Nelson, Grier, Clifford, and Field, JJ.; Grier, J., being only against legal tender as extended to prior contracts), against three (Miller, Swayne, Davis, JJ.), the court then consisting, by law, of eight members. The later judgment was supported by five (Miller, Swayne, Davis, Strong, and Bradley, JJ.), against four (Chase, Ch. J., Nelson, Clifford, Field, JJ.); the court, as reorganized by statute, taking effect December, 1866, consisting of nine members, Grier, J. having resigned; Strong and Bradley, JJ. were new appointments. See Reporter's note, 12 Wall. 528.

[1] *Ante*, p. 108, ix.

[2] *Ante*, pp. 107, 333, 346.

[3] *Ante*, p. 360. As to this question, of the position of the Supreme Court, and its being now a practical question, I refer to an article in the North American Review, February, 1881, — "Partizanship in the Supreme Court," by Senator John T. Morgan.

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CHAPTER VIII.

FURTHER CONSIDERATION OF THE QUESTION OF A REVOLUTIONARY CHANGE OF THE SEAT OF SOVEREIGN POWER. — POSITION OF PRIVATE JURISTS IN REFERENCE TO SUCH A QUESTION. — POSITION OF OTHER CITIZENS IN PUBLIC OR PRIVATE STATION. — THE QUESTION OF ALLEGIANCE A QUESTION FOR ALL.

IT may be that the extracts given in the last chapter from recent judicial opinions will suggest the inquiry — Does the general Government now exist for the benefit of the States, individually and united; or, do the States, individually and united, exist for the benefit of the general Government?

But this is the question which the Supreme Court has always, from its earliest day, failed to answer; for it is contradiction to talk of a supreme or sovereign Union, and at the same time, of a government which may, as a sovereign or supreme government, maintain itself against the States which, in their union, are the sovereign United States.

As has already and repeatedly been stated in these pages, in this matter of recognizing the location of sovereign power, judges are no more than ordinary private citizens. If they leave the interpretation of the Constitution, as law, and undertake to determine the political personality who makes it law, they can at best claim only to speak as impartial historians, but with no other means of discerning the truth than other historians have.[1]

It is the duty of the historian to accept the facts of to-day as he does those of yesterday. It is perfectly legitimate for a judge to recognize that the law he administers to-day proceeds from another sovereign than that from

[1] *Ante*, pp. 5, 105, 215, 350.

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whom the same rule of action proceeded when he administered it as law yesterday;[1] but, from the fact that his authority to apply any rule as law must proceed from some known political superior, a judicial officer would be rather tardy in making any recognition of that sort.

It therefore was not to be anticipated that the members of the judiciary should, in their official character, speak as unrestrainedly as to any political changes which may possibly be discernible as the result of the civil war between the years 1861 and 1868, as may some private jurists, who have appeared since that time as writers on our public law.

I have already herein referred to several recent publications,[2] which in title and form are juristical works, or technical expositions of our constitutional law, as being based on that theory of the authority of the written Constitution, as derived from the will of the people or nation as a mass, which I have hereinbefore represented as necessarily placing the general Government above the United *States*, or the political peoples of the States in a voluntary union.

I readily allow that the authors referred to may not all recognize, as a legitimate consequence from their theory, that result which I have hereinbefore attributed to it; that is, that it makes the general Government the actual and only sovereign.

That Mr. Pomeroy at least denies the propriety of such a conclusion appears in his work on constitutional law, especially from § 86, where he observes: —

"But here it is necessary to repeat and elaborate a general doctrine, which has already been dwelt upon with some emphasis,

[1] In the Slaughter House Cases (*ante*, p. 370), Miller, J. said (16 Wall. 71), — "We repeat, then, in the light of this recapitulation of events almost too recent to be called history."

[2] *Ante*, p. 114, n.

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and which must be constantly called to mind through the whole course of the present inquiry as the solution of many a difficulty and apparent contradiction. This truth is, the absolute and necessary distinction between the nation which is the source of political power, and the government which is the creature of that power, established to act, in certain cases, instead of, or as the agent of, that nation."

This cautionary statement may be noticed as indicating that there is, somewhere, a liability to make the general Government something more than an agent, and that this occasions "many a difficulty and apparent contradiction."

Mr. Pomeroy, himself, fails to make "the distinction" visible; because "the nation," which he conceives as "the source," is only an hypothesis, and has no actual existence as a political personality.

According to the theory sustained in this essay, there has been a tangible, come-at-able somebody who could, as holding sovereignty, be discriminated from the government of which Mr. Pomeroy speaks.[1] But, under his theory and that of a certain school (as a number of writers, more or less distinguishable, may be termed), there is this government plainly enough, on the one hand; but as for the sovereign, on the other hand, he must be sought in the clouds, or in the realms of fancy: for except as this government is found, that sovereign cannot be found.

[1] I understand Mr. Pomeroy as meaning by "people" or "nation" in this connection, the whole mass of inhabitants, without reference to political organization as the political peoples of distinct States, and as agreeing in this with Mr. Jameson's conception, *ante*, p. 328, n. Compare the references, *ante*, p. 118, n.; p. 127, n. I have hereinbefore referred to this theory as that of the school of Story and Webster, rather because these jurists are commonly supposed to have upheld this theory than from my own conviction that this was the case. Neither of them, as far as I know, ever defined what he understood by the words "the people of the United States" (*ante*, p. 337), and each may appear to have sometimes accepted the theory of a division of sovereign powers, resulting from a grant or cession by the States, — the theory sustained by Mr. Webster's biographer, Mr. Curtis, which he thinks was Mr. Webster's own and that of "the best minds in New England" in his day. *Ante*, p. 115, n.

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Whatever may be the idea of his own position which the author intends to give in the section which follows the above citation, its language may be noticed as giving a wrong idea of the views taken by those who fail to recognize his own theory. His words are (*ib.* § 87) : —

"We affirm that the People of these United States are the nation, possessed of supreme powers, and that the government of the United States is their creature and agent. All those theorists who deny the original and essential unity and nationality of this people, declare that the separate states are or were the original nations. As a consequence it is either expressly maintained, or tacitly assumed, that there is no United States apart from the limited government created by the Constitution ; in a word, that the United States, and the government thereof, which we recognize as distinct, are one and the same existence.[1] In this short sentence are summed up the differences between the advocates of nationality and those of state sovereignty. If we fail to apprehend the truth of the doctrine which I have stated, we shall fail to obtain any adequate conception of the imperial character of the people as an organic political society."

As I have understood the States-rights theory, all who have supported it in any form or degree unite in regarding the general Government as the agent of the States in their political union, whatever that may be under that theory.

In the earlier part of this essay I have endeavored to show that one may "deny the original and essential unity and nationality of the people of the United States," as Mr. Pomeroy, Mr. Jameson, and others at the present day, understand the word "people," without declaring that "the States are or were the original nations."

That Mr. Pomeroy's own theory necessarily leads to identifying the general Government and the United States, or rather, in placing that government in the place of sov-

[1] I understand this description as answering substantially to that view which I have tried to define under IV., *ante*, p. 102.

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ereignty which belongs to the United *States*, has, I think, been shown in the debates on the reconstruction measures and in the judicial opinions cited in the last chapter.

It is proper to notice that Mr. Pomeroy, with the view apparently of strengthening his original position, has in the fourth edition of his treatise (1879), in the appendix (§§ 761–763), represented the Supreme Court as having, in recent decisions, sustained the theory maintained in his work. To show this, he cites the language of Chief Justice Chase in Lane County *v.* Oregon, and in Texas *v.* White, *ante*, p. 12.[1]

Readers who are at all familiar with the course of political controversies in this country, during the last ten or fifteen years, will undoubtedly have a general recollection of many occasions on which some statement of political doctrine, agreeing more or less closely with the views advanced by the judges and jurists hereinbefore cited, has been proclaimed as "settled by the war." This has been done too by persons whose connection with public affairs may give more or less weight to such an exposition of a mere opinion. It must be superfluous, as it would be quite impossible, to exhibit their number and comparative importance.

There is, however, a noticeable difference in the various assertions of this as a logical conclusion. Two principal conceptions of the nature of the supposed settlement may

[1] A letter from the Chief Justice to the author is also given as showing that the judge's view was in harmony with his own. Whether such agreement can be found, I should not venture to say. The definition of a State by the judge (*ante*, p. 9) seems somewhat inconsistent with the author's understanding of his much-quoted assertion of State existence (*ante*, p. 12), and the author's article in "The Nation," also given in the same section, approving the decision of the court, appears rather at variance with the original theory of the text-book. At the same time, both the judge and the jurist are contradicted by the theory of the Reconstruction measures and the decisions cited in the last chapter, each placing the States in subordination to the general Government.

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be easily distinguished in such assertions, which, though essentially contradictory to each other, are generally presented in some sort of combination.

1. Of these, one may be called the argument founded upon the lawyer's point of view of the circumstances.

2. The other, — one recognizing in the same circumstances a revolutionary change, or something analogous; which may be called the argument founded upon the notion of "a war of ideas."

In the sixth chapter I have made various extracts from the debates in Congress on the Reconstruction measures, as part of the *res gestæ*, showing on what doctrines of our constitutional law the majority supposed their legislation to be founded. It is likely that many assertions may be found in those debates that some particular doctrine had been "settled by the war." It might be possible to distinguish here and there a debater who had more or less clearly asserted this on one or the other of the two positions above stated.

But in this question, as to the process of reasoning by which it is to be known *how any doctrine can be settled by war*, a legislator is no better authority than anybody else. This is matter of purely logical demonstration.

On this account I offer as illustrations of these methods of proof some which may present the argument in the clearest point of view, without reference to the station of those who are the authors.

As being the most recent statement of this sort, and one proceeding from the present holder of the highest place in the administration of the general Government, I here cite a passage from the Inaugural Address of President Garfield, March 4, 1881: —

"The supremacy of the nation and its laws should be no longer a subject of debate. That discussion, which for half a century threatened the existence of the Union, was closed at last in the

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high court of war by a decree from which there was no appeal, — that the Constitution, and the laws made in pursuance thereof, are and shall continue to be the supreme law of the land, binding alike upon the States and the people. This decree does not disturb the autonomy of the States nor interfere with any of their necessary rules of local self-government, but it does fix and establish the permanent supremacy of the Union."

This view of the circumstances as a "decree" or judgment of an issue at law had often been presented at a much earlier date. As showing the *rationale* of what I have here designated the lawyer's point of view,[1] no better example can be found than that given in the letter of Judge Isaac S. Redfield to Senator Foot, to which reference has herein already been made.[2]

The writer says in the opening: —

"It is probably from the fact that I have attempted to look at the questions alluded to in your letter as 'Reorganization and Negro Suffrage' from an exclusively legal point of view, more than from any other fact, that my deductions present in any degree the appearance of novelty or interest. And I suppose their plausibility, if such they possess, is mainly attributable to that logical sequence which connects them with their antecedents, and which I have attempted to preserve. But I am not insensible to the fact that many logical and plausible theories in civil jurisprudence, when attempted to be reduced to practice, are found as impracticable as those of the most absurd and inconsequential character.

"But as you have had the courtesy to express an interest in my speculations or opinions as a mere lawyer, the only office I aspire to have, I will give you a mere outline of them in the briefest form."

Judge Redfield proceeded to say: —

"I. The first great question, then, is, What has been the result of the war? What has it settled? How does it leave the States?

"1. What questions has the war settled? — War may fairly be

[1] *Ante*, p. 109. [2] *Ante*, p. 269.

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considered as an action pending in the only tribunal having full jurisdiction of questions between nations and fragments of nations, — the tribunal of force — *ultima ratio regum*. The results of the war then may be, not inaptly, considered under the figure of a judgment, in an action in a court of justice; for such in fact is war more than anything else.

"2. The judgment, as in other cases, concludes all the issues involved in the action. The most important of these issues is that in regard to the paramount sovereignty of the nation, and the right to vindicate that sovereignty by force of arms against all aggressions, as well from within as without. We think, then, that the National Government may fairly claim, against those engaged in the rebellion, that the result has established forever their right to the paramount sovereignty, and to vindicate the same by force. And it must follow as a result of this, that the war has conclusively determined that secession is rebellion and treason, and that the National Government may put it down by force of arms, and punish the offenders in any and all legal modes. It will be seen that this is making the national sovereignty not only supreme, but also the judge of the extent and nature of its own powers. This is but the indispensable consequence of the paramount national sovereignty. This was the great and main question involved in the war and which must be regarded as forever put at rest by the result of the war, or the judgment in the action.

"But, it will be asked, How does this leave the States?" —

His answer is, "Unquestionably, in a subordinate position."

By what next follows in his letter, the writer shows that he means that all the States of the Union, not merely the "rebel" States, are thus concluded. That is, his position is that the arbitrament of war between those eleven States or their rebel populations and the government supported by all the States voluntarily continuing in union, was like a trial at law determining the rights of *all the States*, and that the decision attained by their own victory as States composing the Union placed the Northern States

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in a subordinate position to the government *they* had supported.[1]

Judge Redfield said: —

"Unquestionably in a subordinate position. But that is precisely the position in which they are placed by the Constitution."

This description must apply to *all* the States. And he then went on, contradicting his assumption that the question of *the law of the case* had been settled by the arbitrament of war, by stating what that law always had been. But if he had the right to declare this, there was no need of a trial of any sort to settle what the law should be. He remarks: —

"The very fact of giving the national tribunals the supreme jurisdiction in all questions affecting the relations of the States to the National Government and a supervisory power over the State courts, upon all those questions, by inevitable consequence, made the nation supreme and the States subordinate.[2] Every lawyer will understand this," etc.

Judge Redfield, being still limited by his lawyers' point of view, next took up the then mooted doctrine of "State suicide," for holding which, regarding the matter as a legal inquiry, he of course could find no ground.[3]

[1] That is, the Northern States, which were said to be "loyal," were, on this trial, in the same box with the States said to be "disloyal."

[2] I do not know whether Redfield considered himself of the same political school with Story. (*Ante*, p. 272, n.) Here he announced the same theory of the Constitution. But he remarked also in this connection, "Encroachment in such a relation, is the natural course of events. It is the history of all unequal relations that the superior becomes more and more powerful, day by day, while the subordinate, year by year and day by day, becomes more and more dependent. And it makes no difference whether the claim on the part of the superior, in any instance, is just or unjust; it is sure in the end to prevail if persistently pursued." Compare *ante*, p. 343, as to the necessary consequences of making the "National" Government the only depository of sovereign power.

[3] His words are: "4. How, then, shall the States be treated after the surrender of the rebellion? — This will depend mainly upon our views of the

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He recognized that such a political result would make everything clear and simple; but was misled by supposing that, if received at all, it could be received only as an effect of the *war*. In this respect, however, he was no blinder than were Mr. Sumner, Mr. Howe, Mr. Boutwell, and others.[1]

Seven pages of the letter are given to prove the continued political existence of the eleven States. Having thus got himself almost into the position of the "Conservatives,"[2] the writer found himself, as a lawyer, brought face to face with the question of slavery, which he also proposed to settle by finding that the compatibility or non-compatibility of slavery, in *any* State of the Union, with our form of government was one of the issues settled by a war between the Government and the insurrectionary populations of eleven States.

His dilemma and its solution are thus stated: —

"II. But the second grand inquiry, and, we confess, by far the most embarrassing one, remains to be considered, — that is, If all

effect of the war upon the States as political persons or corporate organizations. If they no longer exist, for any purpose, that will be an end of all question. We have nothing to do but to parcel out the territory into new States, at the discretion of the National Government, and there is no occasion to inquire into the *modus operandi*. That ceases to be a question of right and becomes one of expediency merely. But we think very few will claim all this at the present day." The position taken in this essay is that, in reality, this *has been done without being claimed*. *Ante*, p. 235.

[1] *Ante*, pp. 272, 276, 279.

[2] He spoke of the States as one might of corporations holding their powers under municipal law, — argued that secession was *ultra vires* and the ordinances nullities, which was the argument of the so-called conservatives (*ante*, p. 262); but he held that the State was still to be found in a "constructively loyal" portion of the inhabitants of each State. His theory being that held equally by Presidents Lincoln and Johnson, that the powers of each State are not primarily rights of the State as a political personality, but result from the aggregated "legal rights under the Constitution" belonging to individual citizens, which, in the case of those "loyal" to the general Government, were under its protection as legal rights. *Ante*, pp. 149, 252.

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the functions and powers of the States remain the same as before the rebellion, what benefit are we to derive from all this expenditure of blood and treasure? — This is a question often put, and one which carries great weight, far greater than it is entitled to have, in many instances. But we do not fear its application to our own views. We feel that we have already stated great benefits,[1] resulting from the war, in that it has settled the true relations of the State and National authority, and we think the war may fairly be regarded as having determined many other questions.

"1. It seems to us that the National Government may fairly claim that the war has determined the truth that slavery is incompatible with the successful operation of our complicated form of government. We think, then, that the nation may now fairly say to the States where slavery has hitherto existed, that the war, having fully established the point that slavery is a fatal hinderance in the way of the just operation of the National Government, that it must be so treated and effectually abolished by the States." [2]

Being also confronted by the question of reconstruction, slavery being disposed of, it is rather surprising that the learned writer of this letter did not claim that the extent of the powers of Congress, under the guaranty of republican government, over the extension of the elective franchise in *all* the States, was one of the issues settled by the war.

[1] As it requires two parties to make a war, as two to make a case at law, the country at large is under some obligation to the Confederacy for its share in procuring for it the "benefits" of this decision.

[2] I do not associate Mr. G. T. Curtis with the publicists of the modern *Nationalist* School, because I understand him as accepting the theory of a division of sovereignty, and not that of its being held by the nation as a mass. But Mr. Curtis has the same view of an alternative of theories which was decided by "ordeal of battle." In his "Discourse," etc. (*ante*, pp. 294, 300), he remarks (p. 28), "Suppose that the Southern States had succeeded in establishing for themselves, finally, a separate Confederacy, — a firm and distinct nation. No philosophical historian and practical statesman would thereafter have hesitated to say that for any practical purpose the Northern theory of the Constitution of the United States was gone forever. Just so, I think, we ought to regard the war as having put an end to the doctrine of secession." Compare *ante*, p. 89, n.

By a parity of reasoning, if *slavery or no slavery* was an issue, slave-holding should at once have been legalized throughout the United States, in case of the success of the Confederacy.

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There would seem to have been no limit to his competency to determine the issues settled. However, he has argued only from his own interpretation of the guaranty,[1] taking the war as having indicated the particular States to which it should be applied, as a consequence of its having settled the emancipation issue.

Even if there were any real parallel between a war, the nature of which excludes the idea of legal determination, and an action at law between two private parties, who, by the supposition, are under the legislative will of a common superior, by whose intervention the trial is held, it is evident that the author of this letter, trying to write as a lawyer, arrogated to himself individually the right to settle, after the supposed trial of the action, the issues which were to be judged.

It would be consistent with the nature of war to say that the prevailing party must have the power, after its physical power has been acknowledged by the defeat of the other, to consider anything he may choose as settled by it.[2] In the present case, however, as has been shown, there is no evidence that a majority, even of those who maintained the military action of the Government, did so with any such ideas of the nature of the issues; and far less can it be shown that there was a majority of the nation, as a mass, who contemplated such a result.[3]

Throughout this essay I have endeavored to avoid all

[1] As Redfield, in this part of his letter, recognized most explicitly that the extension of the elective franchise, even for "national elections" (*ante*, p. 404), had been left to the States, he found it necessary to elaborate at some length his explanation of the guaranty.

[2] *Ante*, p. 3.

[3] *Ante*, p. 347, n. 4. To say nothing of the fact that such issues had been expressly repudiated by the House of Representatives when the war began (*ante*, p. 42, n.) and in Mr. Lincoln's earliest proclamations (*ante*, pp. 54, 55). Considering how closely Judge Redfield's and Mr. Loring's pamphlets (*ante*, p. 269) accord with the subsequent measures of Congress, and with many later utterances from high places, it would be only justice to remember them as leading exponents of the later American constitutional law.

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allusion to political parties, even by naming them. It must, however, be obvious that, as the questions herein considered affect the political obligations of each inhabitant of the country, it is impossible to cite the words of men whose opinions will be received as representative of those of many others without seeming to introduce the issues of party contest.

In the course of distinguished service during the last fifteen years, as member of the House of Representatives, Mr. Garfield, at occasions presenting issues of primary importance, had stated more or less fully his own theory of our national existence. These statements must now have a greatly increased significance, as representative opinions, in consequence of the elevation of their author to the highest office under the Constitution, depending on the electoral votes of all the States.

I have already cited a passage from President Garfield's Inaugural,[1] as illustrating the claim that, as a mode of settling political principles, a war may be compared to an action at law settling a legal controversy.

It will, however, be only just to the author of the Inaugural to recall that, long before the opportunity to speak with the highest possible *prestige* for his opinions, he had indicated his own acceptance of that basis which has hereinbefore been presented as the only one possible if the theory maintained in this essay is rejected, — the basis that, as matter of historic fact, the theory of government which he, personally, held had become true by revolution.

I therefore cite his words as illustrating the second of the two conceptions of the phrase "settled by the war."[2]

[1] To avoid possible misconstruction, I may state that the entire preceding seven chapters of this essay were already in type before the delivery of this Inaugural, March 4, 1881, and that I had no knowledge of the remarks hereinafter cited from Mr. Garfield's speeches in the House, until after that date.

[2] *Ante*, p. 443.

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Mr. Garfield's Speech, Aug. 4, 1876.

On the 4th August, 1876, the House being in committee of the whole on the state of the Union, Mr. Garfield, being then a representative from the State of Ohio, having the floor, framed his remarks mainly as a reply to those of Mr. Lamar,[1] a representative from the State of Mississippi.

After a few introductory sentences, Mr. Garfield said:—

"With all my heart I join with the gentleman in rejoicing that

the war-drums throb no longer, and the battle-flags are furled,

and I look forward with joy and hope to the day when our brave people, one in heart, one in their aspirations for freedom and peace, shall see that the darkness through which we have traveled was a part of that stern but beneficent discipline by which the Great Disposer of events has been leading us on to a higher and nobler national life.

"But such a result can be reached only by comprehending the whole meaning of the revolution through which we have passed and are still passing. I say still passing; for I remember that after the battle of arms comes the battle of history.[2] The cause that triumphs in the field does not always triumph in history. And those who carried the war for union and equal and universal freedom to a victorious issue can never safely relax their vigilance until the ideas for which they have fought have become embodied in the enduring forms of individual and national life.[3]

"Has this been done? Not yet.

"I ask the gentleman in plainness of speech and yet in all kindness, is he correct in his statement that the conquered party accept the results of the war? Even if they do, I remind the gentleman that *accept* is not a very strong word. I go further. I ask him

[1] Mr. Lamar's remarks on the second of the month are found in the Cong. Record for the first session of the forty-fourth Congress, beginning p. 5087. Mr. Garfield's reply begins on p. 5180 of same report. The speech was, as I have been informed, printed as a pamphlet, with the title, "Can the Democratic Party be safely intrusted with the Administration of the Government?" Passages from it appeared in most of the "Lives" of the successful candidate published before the election in 1880, and a long extract is given in Chips from the White House, by J. Chaplin.

[2] Compare the opening remarks of the first chapter, *ante*, pp. 2, 3.

[3] Compare the quotation from Mr. Jameson, *ante*, p. 367.

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if the democratic party have *adopted* the results of the war.[1] Is it not asking too much of human nature to expect such unparalleled changes to be not only accepted, but, in so short a time, adopted by men of strong and independent opinions?

"The antagonisms which gave rise to the war and grew out of it were not born in a day, nor can they vanish in a night."

But as this is a political question, in distinction from a legal one, the right to discuss it cannot be altogether engrossed by those who may, as statesmen, judges, or private jurists, think themselves specially qualified. Others, not professing to have had juristical training, but as fully qualified by education and civic virtues to consider any question belonging to history and political philosophy as are any members of the judiciary, have declared the theory for which they arrogate the names of "nationalism" and "unionism," settled by the war.[2] It may well be that, from the less technical character of their speeches or writings, their arguments will reach a much wider circle of readers than the best reputed legal treatises can command, and some of them may have an audience abroad among those who have no other acquaintance with the history of our public law.

[1] It will be noticed that here the speaker used the terms, "the conquered party" and "the democratic party," as equivalent terms: and from this passage and others to be cited hereafter, it will appear that he placed all his political opponents, irrespective of residence in States north or south, in the same category in respect to what he here describes as "a revolution," and "unparalleled changes," for opposition to which, as the adherents of an old *régime*, he charges them with treason, while he claims for himself and his political associates the position of successful revolutionists. The passages which in Mr. Garfield's remarks follow the above citation are also an illustration of the theory of a revolution. They will be found hereinafter cited under a somewhat different view of the same question (*post*, p. 465), as illustrating "the war of ideas."

[2] To say nothing of the name "imperialism." Compare Bateman's Political and Constitutional Law, §§ 101–111. I do not concede the justice of this exclusive claim to the terms "nationalism" and "unionism," because I hold that national existence is fully realized under that theory which recognizes the States in union as the sovereign.

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It would be impossible to distinguish any one or more publications with a view to exhibit the train of thought or method of argument adopted by all as a class. The writers referred to may, in a general way, be described as those who maintain that, whether the theory which they approve was or was not true as fact before the year 1861, it has, in consequence of events after that date, now become established as a fundamental fact, enlarging or confirming the powers of the general Government, and subordinating those of the States in some undefined degree.[1]

These writers may or may not appear to their readers to indicate a recognition of anything like a revolutionary change; and, if they do this in any degree, it does not appear to be upon the principle, already herein accepted, that any political change, if it be matter of fact, is to be accepted simply as matter of fact.

The writers referred to do not appear to have thought of showing that the construction of the Constitution, as law, which they personally hold to be correct should be now accepted because the action of the general Government, following its military success and made possible by it,[2] can be defended upon that construction and upon no other. This it would be perfectly legitimate for them to do, and in accordance with the method followed in this essay.

[1] As an example of the history accepted by writers of this class, Mr. R. Frothingham's Rise of the Republic of the United States, p. 3, may be cited: "This element of union has met triumphantly every trial. Its greatest crisis by far was the late appeal to the only jurisdiction between nations, and fragments of nations, the *ultima ratio regum*, — the tribunal of force. The judgment then rendered, after a field of war unparalleled in the annals of domestic strife, is that these States and communities are associated in a bond of union that is indissoluble; that the supreme law of the land ordained in the Constitution is paramount; that the Government, acting under this law, has the right and power to vindicate its authority by force; and that itself is the judge of the nature and extent of its own powers." The author here refers to Redfield's letter, and to Draper's Civil Policy in America, p. 85.

[2] *Ante*, pp. 3, 4, 822.

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Nor do these writers offer any proof that the military success of the general Government, or any other demonstration of its political purposes indicates that "the bulk of the community," or "the people overwhelmingly united,"[1] have determined that a certain view or theory as to the seat of sovereignty shall now be accepted, whatever may have been the actual investiture of sovereignty before the war. They do not attempt to show even that a certain opinion on this subject was embraced by a majority of those who supported the Government in resisting secession as rebellion, nor that the Reconstruction measures were approved by a majority even of the inhabitants of the Northern States. Their argument, when reduced to its elements, is that a certain theory must be now recognized as established because they, who individually think it ought to be received, were, though comparatively perhaps only a handful, among those who supported the prevailing combatant.[2]

It might be inferred from the language of some of these writers that there had been two political doctrines as to the best foundation of government for this country, and two opinions as to the moral, economical, and political advantages or disadvantages of negro slavery; that these two doctrines and two opinions were perfectly well apprehended by the people of the country, North and South, as a mass of men, women, and children, without discrimination of any bodies of electors or voters for State or general governments as actually holding political power; and that, further, there had been a general understanding among this people, as a mass, North and South, that there should

[1] *Ante*, p. 847.

[2] Or, their argument is that "the people," as a whole, must have sanctioned certain measures, because all persons who disapprove such measures are not to be considered as part of such "people." Compare the remarks of Mr. Garfield hereinafter cited (*post*, p. 470) from the continuation of his speech of Aug. 4, 1876.

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be a war, in which the Government of the Confederated States should represent one doctrine of government and one opinion of slavery, and the general Government should represent the other doctrine and opinion, and that the doctrine and opinion represented by the conqueror should be accepted by the whole people, as a mass, North and South, for the future, as the only basis of political existence: the choice between the two doctrines and two opinions being made to depend upon a bloody war of four years' duration, though it might, by a like general understanding, have been made to depend on a game of cards or the turning up of a cent.

But, however confidently any disciples of this school may present their own view of constitutional jurisprudence as something which may be known by the victory of one army and the defeat of another, they do not relinquish in the least their inconsistent and now superfluous claim for a basis for those views in the earlier political history.

In fact, it would appear from the method of demonstration adopted by all of this political school, whether speaking as judges of the Supreme Court, statesmen, private jurists, or historians, that the political events which have occurred since 1861 are not only taken by them as indicating the present and prospective possession of sovereignty by the nation as a mass, solely represented by a "National" government, in respect to which the States are to be subordinate corporations, but as being *testimony* that the same possession of sovereignty existed when the Constitution was adopted in 1787.[1]

From the language of the greater number of these pub-

[1] I am not aware that anybody, thus far, has claimed that the historical question whether negro slavery had ever been lawful in the colonies and States was one of the issues settled by the war. Though some seem inclined to regard their own interpretation of the Preamble of the Declaration of 1776, in the sense of a legislative abolition decree, as one of the matters so settled.

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licists it might be inferred that it had been understood and agreed among all, North and South, not merely that the issue in the field should determine *for the future*, the political fact for the whole country, but that the same appeal to the God of battles should settle which of the two theories had the support of history before 1861; that is, which view of facts from 1776 to 1861 should thereafter be held as the genuine one.[1]

The simplicity in this respect of some of these writers on public law suggests a return to that mediæval jurisprudence under which the honor of a woman, or the loyalty of a man, or any question of *past* fact, was determinable by the ordeal of fire or by that of battle, by champion or in person.

So far as publicists of this class, whether they claim to speak as statesmen, lawyers, or historians, attempt to avoid these puerilities, they do it by resorting to others.

They argue that the prevailing party, because it was the party which actually prevailed, must have represented *ideas* which, being forces of nature or *laws* of nature in that sense, must always have had, in themselves, authority as municipal law derived from political sources, even though the written Constitution, the earlier laws of Congress, the laws of the several States, and the political and social habitudes of the people might have been contrary to these ideas.[2]

Hence it follows, according to their reasoning, that, however inconsistent the action of the general Government may have been with that which was to have been expected by ordinary deduction from the Constitution and general principles of public law, there was no revolutionary action or usurpation on its part[3] in treating the at-

[1] Compare *ante*, p. 99, as to the constant tendency to confound *doctrine* and *history* in these questions.

[2] Compare, *ante*, p. 278.

[3] *Ante*, p. 107.

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tempted secession as the rebellion of States in their political capacity. The Government, while in appearance actively carrying out certain measures, as if in exercise of independent political volition, was really, according to their argument, only unconsciously, or at least passively, exhibiting the operation of forces all along concealed beneath constitutions and political arrangements which were now for the first time exhibiting their necessary though secret unison with the "higher law."[1]

It may be well to notice that this idea or law of *nationalism*, *unionism*, *imperialism*, or whatever else it may be called, has not hitherto been presented by anybody as known from the actual succession of political events in this country. It would be perfectly reasonable, and in accordance with the distinction already herein made,[2] for non-professional advocates of the theory to argue that on no other basis than this can the action of the Government since 1861[3] be known as legitimate, or as anything else than usurpation. They might say that, as matter of fact and history, submission to this action has been enforced

[1] This corresponds with the fetish ideal of the Constitution (*ante*, pp. 805, 821, 339, 357); for the supposed deity must have its choir of self-constituted priests to proclaim its oracles.

The position above described is totally distinct from the recognition that any holder of supreme political power must ultimately come to grief who does not conform his legislation to the observed "laws of nature." This point is well stated in Argyll's Reign of Law (p. 826, Ch. VII., "Law in Politics"), and the legitimate recognition of such a "reign of law" is illustrated in the introductory remarks by Mr. Garfield, on a bill for taking the Ninth Census, Dec. 16, 1869, 2d Sess. 41st Congress, Globe, 178. But, here, the question is whether one citizen may be treated as a traitor by another, because he may not think it advisable to exercise his political rights, under a constitution, in accordance with doctrines which the other regards as laws of nature, or "decrees of the Almighty." Compare, *ante*, p. 367.

[2] *Ante*, p. 348.

[3] Either in suppressing the rebellion, as the rebellion of States in the Union (*ante*, p. 354), or in abolishing slavery in the slaveholding States of the Confederacy, while recognizing them as possessors of the same power over personal *status* which was held by every other State. (*Ante*, p. 200.)

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under this idea, and, therefore, it must now be accepted in theory, even though the judiciary and the jurists should have failed in their defence of that action under any of the methods ordinarily known in courts of law for determining any action as legitimate under written constitutions.[1]

But, in contrast to this method, these writers present their solution of the problem as a deduction from principles assumed *a priori*.

They present what they call nationalism, unionism, and empire, as a political force necessarily inherent, at the present day at least, in all masses of population occupying some presupposed territory,[2] which like the will of an actual person claiming homage or allegiance, unifies or concentrates political powers formerly held separately, or as antagonistic, within the same territory.

From the reputation for attainment in physical science which some writers of this school can justly claim, it is only fair to infer that they do not themselves regard this principle of theirs as an *a priori* assumption, but as one of those "laws," as they are accustomed to term them, which are generalizations of observed facts; that is, modes of action in nature. They would probably say that they know that this "law," which they call "nationalism," etc., exists as a force controlling the wills of men in their political action, from a generalization of successive events in European political history. They would probably point to the fact that what are now called "nations," that is, populations more or less homogeneous in race and connected by a common lan-

[1] *Ante*, pp. 348, 361.

[2] The territory to be recognized as the place for the destined nation is supposed by such writers to be determined, not by antecedent political arrangements (for under their view these must be consequences and not causes), but by economical considerations, based on geographical and topographical advantages or disadvantages. See Dr. Draper's political treatises. Compare, *ante*, p. 98, note.

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guage, occupying a relatively large territory under a unitary political system of some sort, exist at the present time where a few centuries, or even decades, ago a divided or relatively fractional arrangement of the same lands and populations, in respect to political existence, had prevailed.[1]

So far as any of these writers, whether jurists or physicists, present any argument in applying their supposed "idea," it is based entirely on the double meaning of the term "a law."[2] They assume that what they recognize as an "idea," or have conceived as a *law* in the sense of an observed fact or mode of action, that is, a law in the secondary sense, shall be understood by everybody as a law in the primary sense, that is, as a rule of action. They conceive of this law as one of political authority, acting upon each individual constituent of the several masses of population, which, with the territory occupied, should be "a nation," and making it the political duty of each, which it is treason to deny, to abandon all political combination in and all allegiance to pre-existing smaller political personalities, and to submit themselves to some more unified or consolidated form of political existence, distinguishable by grander geographical conditions.

It is, however, unfortunate for writers of this class that the history of political society in other times and countries does not support the generalization which they call "law," that is, law in the secondary sense of the word, as a mode of existence or of action. In point of historic fact, the genesis of modern nations has not taken place in conse-

[1] "Political integration," is a term used by Herbert Spencer as applicable to this process.

[2] "Words, which should be the servants of thought, are too often its masters; and there are very few words which are used more ambiguously, and therefore more injuriously, than the word 'law.' . . . It matters little in which of these senses it is used, provided the distinctions between them are kept clearly in view, and provided we watch against the fallacies which must arise when we pass insensibly from one meaning to another."—Argyll's Reign of Law, 5th Am. Ed. p. 63. Compare, *ante*, p. 97.

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quence of any "idea" or "yearning" in populations, compelling them to become unified or massed together under one consolidated government. The unification has taken place, in times more or less recent, but always by a process exactly the reverse of that which these supporters of "nationalism" have imagined as a basis for their generalization. As matter of history, the political change, from a structural separatism to a structural nationalism, has been effected by the action of some distinct and relatively minor political organization, employing force, fraud, diplomacy, intrigue, dynastic marriages, etc., in absorbing or adding to itself its weaker political neighbors as the parts constituting the personality finally known as a nation.

As matter of historic fact, it has always been the pre-existing smaller political personality, or state, that has brought about the later existence of the nation as a mass of population in unity, and never a pre-existing mass of population in unity as the nation that has brought about the later existence of subordinate smaller political personalities, or states.

This has been exemplified in every country in Europe, from the first decline of feudal institutions founded on the ruins of the Roman Empire, to the latest political arrangements.[1]

[1] In Great Britain from the time of the Anglo-Saxon heptarchy, in the absorption of Wales, Ireland, and Scotland; in France under Louis XI., Henry IV., and their successors; in Spain from the time of Ferdinand and Isabella. So in Italy by the history of the house of Savoy, and in Germany by that of Prussia, — mostly within the last half century. "But in both it was by the advance of an existing state, which extended itself to include wider and wider territories, and gave to them its organization, that the unity of the nation was brought about. And this was done with little or no change in the internal constitution of the growing kingdom, little or no movement towards a resettlement of society on democratic foundations. In the constitution of the North German Confederation and the new German Empire there is no mention and little indirect recognition, of those 'Fundamental Rights of the German people,' on which the Frankfort Parliament of 1848–1849 spent so much precious time and toil." — Bryce's Holy Roman Empire, 437.

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Of Emancipation under an Idea as Law.

It is also remarkable that in the very latest instances, and while this theory of nationalism as an "idea," or force of nature operating of necessity, has been most loudly proclaimed and made the doctrine of a school, its advocates have generally been found resisting the actual unification, when it was in progress under the only method by which it had ever been known to take place before. They saw their desired end in the process of accomplishment by the only means which experience had shown to be practicable; but they opposed it because it was not brought about in accordance with their theory, that is, in some unexplained manner, incompatible with the nature of things.[1]

It is by a similarly deceptive use of the double meaning of the word "law" that so many have justified for themselves the action of the Government in respect to negro slavery, not so much in the matter of emancipation during the war[2] as in the Reconstruction policy followed in securing the assent of the ten States of the Confederacy to the Thirteenth and Fourteenth Amendments, and in forcing upon them the admission of the emancipated negroes to suffrage.[3]

[1] Compare Lectures on German Thought, by K. Hillebrand, pp. 288–286, remarks on Germans, and the political party called "Little Germany." I claim that while the course of events in this country, since 1861, has illustrated the process by which all national consolidation had previously taken place, it is also a direct contradiction of the theoretical nationalism of these publicists. It was *the States remaining in their voluntary union*, not a "National" government, not an abstract, — "the Union," — distinguished from States united, and far less the people or nation as a mass of individuals, who by force established their exclusive possession, in union, of all sovereignty over populations disposed to resist it. *Ante*, pp. 151, 354, n. 2.

[2] The emancipation, so far as it was independent of the Fifteenth Amendment, may be popularly supposed to be due to an exercise of a "war-power" held by the executive. Compare, *ante*, p. 199. As other articles in the North American Review on this subject have herein been noticed (*ante*, p. 347), a still later assertion of the validity of the Emancipation Edict, in an article by Mr. Aaron F. Ferris, December, 1880, should be also mentioned.

[3] *Ante*, pp. 217, 256.

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Of Ideas regarded as Laws.

Having recognized what they call an "idea," as a conception based on an observed succession of facts in the history of general jurisprudence, that is, a *law* in the secondary sense, indicating the increase of equality among all private persons in relation to the state and the decline of all forms of involuntary servitude, — some persons present this "idea" as a *law* in the primary sense of a rule of action, which, like the "idea" or "law" of nationalism or unionism, may have coercive effect independently of the volition of any possessor of political force.

But, even if it be admitted that such idea or principle, or law in the sense of an observed mode of action, is distinguishable by the philosophical historian in the history of social institutions,[1] it is evident from the nature of political existence — which is nothing else than the manifestation of personal will, the will of one or of many actual human beings[2] — that such a law imposes no political obligation upon anybody. By undertaking to enforce it, a government must contradict the position that it is such a *law* or supposed necessary condition of things; for a law that has to be enforced by a political sovereign cannot be a law of nature or observed condition of existence.[3] The so-called "laws" discovered by Galileo, Kepler, and Newton acted for them and for all the popes, princes, and peoples of

[1] The author of the Reign of Law distinguishes five secondary senses of the word *law*; the fifth, — "As applied to abstract conceptions of the mind, — not corresponding with any actual phenomena, but deduced therefrom as axioms of thought, necessary to our understanding of them. Law, in this sense, is a reduction of the phenomena, not merely to an order of facts, but to an order of thought." 5th Am. Ed. p. 65, see also p. 108 of the same. Undoubtedly, an idea or law of nationalism or unionism, in this sense, may be recognized. So, too, the famed "social compact" is a fact, regarded as a law in this sense, and the same may be said of the doctrine of natural equality. Compare Jameson's Const. Law, §§ 65–67.

[2] Compare Dr. Maine, *ante*, p. 329, note.

[3] "Force is the root-idea of law in its scientific sense." — Reign of Law, p. 69.

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their times, whether the popes, princes, and peoples ordered them to act or not.

In applying their "ideas" or "laws" to the circumstances of this country during the last twenty years, the publicists of this school represent the general Government as applying or enforcing these ideas or laws as the rule of a known political superior, which it was criminal or treasonable on the part of any States or individual citizens to disobey.[1]

To bring about the required connection between these ideas, or so-called "laws," and the political authority represented by the general Government, these publicists imagine the ideas themselves as the actual parties in a war against opposite ideas of slavery and separate State sovereignty, — a war which in appearance only was carried on by that government as in the ordinary case of a holder of political power resisting an armed rebellion.[2]

It is common with them to speak of the war as "a war of ideas," and of the issue of the war as determining the moral and political status of two classes of the inhabitants of this country, regarded as subjects, partisans, or allies of one or the other of these two sets of ideas, without reference to any question of pre-existing allegiance to some political superior.

[1] *Ante*, pp. 271, 278.

[2] In the course of a debate, to be noticed hereinafter, Mr. Garfield said, June 27, 1879, 46th Cong. 1st Sess. Record, 2390: "The dogma of State sovereignty, in alliance with chattel slavery, finally made its appeal to the court of last resort, where the laws are silent, and where kings and nations appear for judgment. In that awful court two questions were tried, — Shall slavery live? and Is a State so sovereign that it may nullify the laws, and destroy the Union? Those two questions were tried in the thousand battle-fields of the war; and if war ever 'legislates,' as a leading Democrat once wisely affirmed, then our war legislated finally upon those subjects, and determined beyond all controversy that slavery never should again live in this republic, and that there is not sovereignty enough in any State either to destroy the Union or nullify its laws." In this incongruous mixture of images, war figures both as judge and legislator.

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Of a War of Ideas.

Under this view of the nature of the war, the citizens of the States of the Confederacy are to be deemed rebels or traitors, not because they rose in arms against a political sovereign, but because the armies representing slavery and separate State sovereignty were defeated by armies representing the antagonistic ideas.

It is therefore perfectly natural, or logical, for these persons to regard as rebels and traitors any citizens of a Northern State who disapproved of the emancipation policy, or who believed that the Constitution derived its authority from the States in union, even though they had supported the general Government in maintaining its constitutional authority.[1]

From such premises it would be natural to conclude that, if the military result had been different, not only would the Confederate States have achieved their independence, but the people of the Northern States — or a portion of them, easily distinguished by their professed devotion to "ideas" — might have been legally punishable by the conquerors as traitors.

But as this would be a self-stultifying possibility, many have tried to make out a connection between their own ideas of nationalism or unionism, of liberty of personal condition, political equality, etc., and the legislative will of a possessor of political power, by assuming that, as matter of history, these ideas had been proclaimed with legislative intent by the people or nation, as sovereign, at the time of the Revolution of 1776, in advance of any legislative action of any State or Federal government. They refer to the preamble of the Declaration, as containing a rule of action binding and loosing with the force of law, though they admit that it had been constantly violated from that moment, by the constitutions of the States, the constitution

[1] Compare *post*, p. 468 and the citations to be given hereinafter from Mr. Garfield's speech of Aug. 4, 1876.

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of the United States, and the laws proceeding from the general and State governments.[1]

The most recent illustration of this deduction of legal principle is to be found, somewhat fantastically modified, in the Inaugural of President Garfield, in a sentence immediately following those already cited, *ante*, p. 400.

"The will of the nation, speaking with the voice of battle, and through the amended Constitution, has fulfilled the great promise of 1776, by proclaiming 'liberty throughout the land to all the inhabitants thereof.'"[2]

In continuing his remarks (*ante*, p. 452) in the House, on the 4th August, 1876, Mr. Garfield said: —

"Mr. Chairman, great ideas travel slowly, and, for a time, noiselessly as the gods, whose feet were shod with wool. Our war of independence was a war of ideas, of ideas evolved out of two hundred years of slow and silent growth. When, one hundred years ago, our fathers announced as self-evident truths the declaration that all men are created equal, and the only just power of governments is derived from the consent of the governed,[3] they uttered a

[1] This idea may be traced in many of Mr. Lincoln's addresses, as can be seen in any of the memoirs which have been written. Compare Mr. Lowell's expressions. (*Ante*, p. 271.) Mr. Boutwell, in a speech at Weymouth, July 4, 1865, said that the government had, till then, proved a failure, because it did not agree with the Preamble to the Declaration.

[2] Those who are familiar with the minor incidents of the Revolution will suppose that the record of the promise referred to was made, when the Declaration was proclaimed, by the ringing of a bell, popularly known as "the Liberty Bell," in the belfry of the building in Philadelphia afterwards called Independence Hall, in which the Revolutionary Congress was assembled. This bell, at its first casting in England, and at its recasting, after fracture, in Philadelphia, bore the inscription; "By order of the Assembly of the Province of Pennsylvania, for the State House in the city of Philadelphia, 1752. Proclaim liberty throughout the land to all the inhabitants thereof. Levit. xxv. 10."

The judiciary, hereafter, may be compelled to be guilty of a bad pun, by citing the founders of this bell as even higher authority than the "founders" of the Constitution.

[3] The speaker's idea of "the consent of the governed" may be peculiar. During the first (extra) session of the Forty-Sixth Congress, an excited debate arose from the opposition to an appropriation bill for the support of

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doctrine that no nation had ever adopted, that not one kingdom on the earth then believed. Yet to our fathers it was so plain that they would not debate it. They announced it as a truth 'self-evident.' . . .[1]

"It will not do, Mr. Chairman, to speak of the gigantic revolution through which we have lately passed as a thing to be adjusted and settled by a change of administration. It was cyclical, epochal, century-wide, and to be studied in its broad and grand perspective, — a revolution of even wider scope, so far as time is concerned, than the Revolution of 1776. We have been dealing with elements and forces which have been at work on this continent more than two hundred and fifty years. I trust I shall be excused if I take a few moments to trace some of the leading phases of the great struggle. And in doing so, I beg gentlemen to see that the subject itself lifts us into a region where the individual sinks out of sight and is ab-

the army for the year ending June 30, 1880. Mr. Garfield, March 29, 1879, speaking of this action of the majority as "revolutionary" said: "Our theory of law is free consent. That is the granite foundation of our whole superstructure. Nothing in this republic can be law without consent, — the free consent of the House; the free consent of the Senate; the free consent of the executive, or, if he refuse it, the free consent of two thirds of these bodies. Will anybody deny that? Will any man challenge a line of this statement, — that free consent is the foundation rock of all our institutions?" It may at least be questioned whether anybody ever understood the "consent of the governed" as meaning only that the legislature should be free to use its power. Mr. Garfield's application was that the majority would be using "its voluntary powers to destroy the government" by refusing the appropriation to carry into effect the provisions of an existing statute. Cong. Record, p. 116.

[1] The intervening paragraph is as follows: —

"Whence came the immortal truths of the Declaration? To me this was for years the riddle of our history. I have searched long and patiently through the books of the *doctrinaires* to find the germs from which the Declaration of Independence sprang. I find hints in Locke, in Hobbes, in Rousseau, and Fénelon; but they were only the hints of dreamers and philosophers. The great doctrines of the Declaration germinated in the hearts of our fathers, and were developed under the new influences of this wilderness world, by the same subtile mystery which brings forth the rose from the germ of the rose-tree. Unconsciously to themselves, the great truths were growing under the new conditions, until, like the century-plant, they blossomed into the matchless beauty of the Declaration of Independence, whose fruitage, increased and increasing, we enjoy to-day."

Compare remarks on the same subject, *ante*, pp. 297, 314.

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sorbed in the mighty current of great events. It is not the occasion to award praise or pronounce condemnation. In such a revolution men are like insects, that fret and toss in the storm, but are swept onward by the resistless movements of elements beyond their control. I speak of this revolution, not to praise the men who aided it, or to censure the men who resisted it,[1] but as a force to be studied, as a mandate to be obeyed.

In the year 1620 there were planted upon this continent two ideas irreconcilably hostile to each other. Ideas are the great warriors of the world; and a war that has no ideas behind it is simply brutality. The two ideas were landed, one at Plymouth Rock, from the Mayflower, and the other from a Dutch brig at Jamestown, Virginia. One was the old doctrine of Luther, that private judgment, in politics as well as religion, is the right and duty of every man; and the other that capital should own labor, that the negro had no rights of manhood, and the white man might justly buy, own, and sell him and his offspring forever. Thus freedom and equality on the one hand, and, on the other, the slavery of one race, and the domination of the other, were the two germs planted on this continent."

The speaker continued with a brief allusion to the course of the antislavery contest in the House and in the country, after which he remarked: —

"This conflict of opinion was not merely one of sentimental feeling; it involved our whole political system; it gave rise to two radically different theories of the nature of our Government, the North believing and holding that we were a nation, the South insisting that we were only a confederation of sovereign States, and insisting that each State had the right, at its own discretion, to break the Union, and constantly threatening secession where the full rights of slavery were not acknowledged."[2]

[1] The reader may compare, on this point, the concluding portions of these remarks.

[2] The citations made from this speech are given here merely as exemplifying a certain conception of the political history of the country since 1861, in connection with the possible recognition of a revolution. It is therefore not necessary to notice the character of any particular statement as to earlier history, either for truth or falsehood.

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Mr. Garfield's Position as a Revolutionist.

It is not material here to discuss the position taken by the speaker in thus presenting the question of allegiance and of political duty as dependent on the moral question of the fitness or unfitness of negro slavery.[1] It is enough to remind the reader that the purpose of this essay has been to present the former question by itself, and as one which necessarily arises in every country, whatever differences in complexion or race may exist among its inhabitants and whatever may be its laws of personal condition.

In the argument of the speaker on this occasion, however, it was essential that he should thus combine these questions in determining the position of his fellow-citizens in his own and in other Northern States. For the remainder of his speech contains the proposition that all who in any part of the country held a different view from himself and friends as to the powers of the general Government, more especially in reference to laws of personal condition, were in the position of rebels and traitors towards the actual administration controlled by his own party.

And this proposition was presented as a consequence of events since 1861, whereby, according to his own statement, he with his political friends occupied the position of successful revolutionists, — a position enabling them to

[1] As a member of the Thirty-Ninth Congress, Mr. Garfield declined "a general discussion of the Reconstruction policy," 1st Sess. 39th Cong. Globe, 2462, acquiescing, rather than agreeing, in the less heroic treatment approved by the majority. He favored a more stringent disfranchisement of participants in the rebellion, and a provision for universal suffrage; regretting "that the House could not have found the public virtue such that we might come out on the plain unanswerable proposition, that every adult intelligent citizen of the United States, unconvicted of crime, shall enjoy the right of suffrage." *Ib.* 2462–2464. In the debates on Bill No. 1143, *To provide*, &c., Mr. Garfield advocated purely military rule, in the strongest terms, 2d Sess. 39th Congress, Globe, 1104, 1183, 1820; agreeing with Mr. Stevens, Mr. Shellabarger, and their friends. Compare *ante*, pp. 225, 232, 246, 258.

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charge with treason all who opposed their measures of government for being contrary to the written Constitution and the former conditions of political existence.[1]

That this was Mr. Garfield's position on this occasion appears from his drawing a parallel between the control of the general Government by those who had "adopted" and should thereafter hold the conquering "ideas," and the establishment of a new dynasty in England at the revolution of 1688, and by his placing all his party opponents, whether personally connected with the Southern Confederacy or not, in the position of those who in that revolution suffered for treason in adhering to the Stuarts, and those who in the American revolution of 1776 were known as Loyalists or Tories, for their adhesion to the crown.[2]

[1] In other words, Mr. Garfield claimed, in this instance, not that the supremacy of the general Government, in respect to all the States, was established by the war, but that a revolution had taken place giving that supremacy to *the party* professing certain political and moral "ideas." In his speech of Jan. 28, 1864 (see note below), he had claimed rights founded on revolution, *for the government*, by whomsoever supported.

[2] This was not the first time Mr. Garfield had drawn these parallels, when attributing to the administration powers derived from a revolution. He advocated the Confiscation Acts, as justified by the customs of international law, as between alien enemies, and at the same time as municipal legislation against rebellious subjects. See remarks Jan. 28, 1864, 1st Sess. 38th Cong. Globe, 399–403. In this he was like many others. (*Ante*, p. 170.) But to sustain the last of these positions he reasoned from a supposed resemblance between the situation of our government, and that of England in 1688, and that of the colonies in the Revolution. I have myself (*ante*, p. 223) indicated a resemblance between the position of Parliament in 1688, in reference to the succession to the throne, and that of Congress in reference to the reconstructed States; but not intending to present either as revolutionary. I cited Macaulay's description of the conflict of opinion resulting in harmony of action, as showing how studious were all who combined in calling a new occupant to the throne to avoid the position of revolutionists. Mr. Garfield's comment on this action of Parliament is: "We are taught by this, that whenever a great people desire to do a thing which ought to be done, they will find the means of doing it." — Globe, 403. The inference from such arguments is that Mr. Garfield thought, at that time, that the rebellion could not be put down without usurpation on the part of the government, to be called "revolution" if successful.

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Mr. Garfield's Position as a Revolutionist.

Mr. Garfield proceeded to say: —

"Thus the defence and aggrandizement of slavery, and the hatred of abolitionism, became not only the central idea of the Democratic party, but its master passion. . . . Over against this was arrayed the Republican party, asserting the broad doctrines of nationality and loyalty, insisting that no State had a right to secede, that secession was treason, and demanding that the institution of slavery should be restricted to the limits of the States where it already existed. But here and there many bolder and more radical thinkers declared with . . . that there never could be union and peace, freedom and prosperity, until we were willing to see John Hancock under a black skin."

As Mr. Garfield was arguing on the proposition that a revolution of some sort had taken place, it must be inferred that he either regarded these doctrines of the Republican party as revolutionary, or supposed that the administration under the nominal leadership of that party had followed the path of revolution under the control of those "bolder and more radical thinkers."

In view of such an alternative the importance of resorting to the "war of ideas" is easily seen. It serves to exculpate everybody from responsibility for revolutionary action, and at the same time confirms the criminality of those who opposed the persons actually engaged in effecting the change. Another method of escaping the inconveniences of the revolutionary position, which is equally reasonable and which to many people seems more devout, has been to refer to the will of God the responsibility for following their own judgments, — a method often illustrated by Mr. Lincoln's expressions, though framed in the shape of a disclaimer of personal merit.[1]

[1] In a letter to Colonel Hodges of Kentucky, dated April 4, 1864, after describing his position taken in an interview with Governor Bramlette and Senator Dixon, Mr. Lincoln wrote, "In telling this tale, I attempt no compliments to my own sagacity. I claim not to have controlled events, but confess that events have controlled me. Now, at the end of three years'

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Afterwards, in the closing portions of his remarks, Mr. Garfield said: —

"Mr. Chairman, ought the Republican party to surrender its truncheon of command to the democracy? The gentleman from Mississippi says, if this were England, the ministry would go out in twenty-four hours with such a state of things as we have here. Ah, yes! that is an ordinary case of change of administration. But if this were England, what would she have done at the end of the war? England made one such mistake as the gentleman asks this country to make when she threw away the achievements of the grandest man that ever trod her highway of power. Oliver Cromwell had overturned the throne of despotic power, and had lifted his country to a place of masterful greatness among the nations of the earth; and when, after his death, his great sceptre was transferred to a weak though not unlineal hand, his country, in a moment of reactionary blindness, brought back the Stuarts. England did not recover from that folly until in 1689 the Prince of Orange drove from her island the last of that weak and wicked line. Did she afterward repeat the blunder?

"For more than fifty years pretenders were seeking the throne, and the wars . . . till the cause of the Stuarts was dead. They did not change as soon as the battle was over, and let the Stuarts come back to power.

"And how was it in our own country, when our fathers had triumphed in the war of the Revolution? When the victory was won, did they open their arms to the loyalists, as they called themselves, or tories, as our fathers called them? Did they invite them back? Not one. They confiscated their lands. The States passed decrees that no tory should live on our soil. And when they were too poor to take themselves away, our fathers, burdened as the young

struggle, the nation's condition is not what either party or any man desired or expected. God alone can claim it. Whither it is tending seems plain. If God now wills the removal of a great wrong, and wills also that we of the North, as well as you of the South, shall pay fairly for our complicity in that wrong, impartial history will find therein new causes to attest and revere the justice and goodness of God."

In presenting "Nationality and Emancipation" as ideas acting in war like actual persons, Dr. Draper quotes in support of his theory this declaration of Mr. Lincoln as "embodying a profound philosophical truth, the result of his meditations on the war." — The Civil War, etc. iii. 642.

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nation was with debt, raised the money to transport the Tories beyond seas or across the Canada border. . . .

"Now, I do not refer to this as an example which we ought to follow. O, no. We live in a milder era." . . .

After quoting a remark of John Adams, taken from a centennial address by Dr. Storrs: —

"Now, Mr. Chairman, after all the fearful corruption of his time described by John Adams, our fathers never thought it necessary to call the tories back to take charge of their newly-gained liberties.

"I will close by calling your attention again to the great problem before us. Over this vast horizon of interests, North and South, above all party prejudices and personal wrong-doing, above our battle hosts and our victorious cause, above all that we hoped for and won, or you hoped for and lost, is the grand onward movement of the republic. . . .

"And until these great results are accomplished, it is not safe to take one step backward.[1] It is still more unsafe to trust interests of such measureless value in the hands of an organization whose members have never comprehended their epoch, have never been in sympathy with its great movements, who have resisted every step of it progress, and whose principal function has been

'To lie in cold obstruction
Across the pathway of the nation.'

"It is most unsafe of all to trust that organization when, for the first time since the war, it puts forward for the first and second place of honor and command men who, in our days of greatest danger, esteemed party above country, and felt not one throb of patriotic ardor for the triumph of the imperilled Union, but from the beginning to the end hated the war and hated those who carried our eagles to victory.[2]

[1] Record, 5186. Would it be wronging the speaker to suppose that he meant to imply that, even though the opposite party should prove to have a majority of the votes in the then ensuing elections, it would be the right or duty of the party representing his own *ideas* to retain the control of the administration by fraud or by force?

[2] It may be only fair to Mr. Garfield to remind those who are not familiar with the ordinary course of debate in Congress that these remarks were

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"No, no, gentlemen; our enlightened and patriotic people will not follow such leaders in their rearward march. Their myriad faces are turned the other way, and along their serried lines still rings the cheering cry, 'Forward!' till our great work is fully and worthily done." [*Loud and continued applause.*]

That all of this school, at the present day, whether speaking as judges, jurists, statesmen, historians, or political philosophers, may justly be charged with resting their position, whether they acknowledge it or not, on a revolutionary change since 1861, is apparent from the fact that none have explained how a State's capacity to secede, or to carry on a war for that end, is less cognizable than before.

So far as they have attempted this, it is by the assertion that the States in union are no longer sovereign in any degree; that is, that no State now holds even the "reserved" powers independently, but only as subordinate to a "National" (general) Government, which, as the highest visible representative of sovereignty, applies the Constitution as law acting upon people and States as its subjects.[1]

But nothing approaching to a historical demonstration of this has been attempted by anybody. Everything that has been proffered for such a demonstration is, really,

made in the committee of the whole on the state of the Union, in which case no particular motion is under discussion, and the members have a practically unlimited field for debate. This speech was also delivered when a presidential election was in prospect, at which period speakers make the most of their opportunity to promote party triumphs. The remarks of Mr. Garfield might pass, with those of many others at that time, for ordinary electioneering rhetoric, and would not have been noticed here but for his present prominence. An argument very similar to that made in this speech appears as the basis of an article by Senator G. F. Edmunds, in the North American Review, January, 1881, "Controlling Forces in American Politics," from which it might be gathered that the war had settled questions of revenue and economical policy in accordance with the "ideas" of a certain party controlling the Administration.

[1] *Ante*, pp. 341–347.

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nothing beyond the older assertion of the superiority of the nation as a mass of individuals over the politically organized States, — a superiority resulting, practically, in the supremacy of the general Government.

How this superiority of the nation is to be otherwise manifested is not told, unless by the use of certain adjectives, such as "imperial" as applied to the nation or the people as a mass. But by whom, or in what way, imperialism is to exhibit itself is left to the imagination.

That the imagination of some writers has been strongly excited by the magnitude and somewhat sanguinary complexion of the hitherto novel experiences of this country during the war, may be inferred from the manner in which they have agreed in alluding to Rome, as an exemplar which this nation or people of the so-called United States is to resemble, to rival, and to surpass.[1]

As I have understood the modern use of the words in political science, "empire" and "nation" represent two essentially antagonistic forms of political existence. And, as I have read history, nothing could be more unlike than the conception of the Roman state, either as republic or as empire, and any situation hitherto occupied by the political personality known as the United States.

The idea conveyed by the word "nation" is altogether

[1] Mr. Pomeroy, Const. Law, § 57: — "The people of the United States, — that new-born Nation destined . . . until, being made perfect by suffering, it shall wield an influence over humanity even surpassing that exerted by the deathless empire of Rome." See also in Mr. Jameson's Const. Convention, § 33, an elaborate attempt to find a parallel in the history of Rome with the prospects of the United States. Dr. Draper, Civil War, etc. iii. 675: — "The mind of the nation recognizes that it is the destined successor of Rome," and in Thoughts on the Future Civil Polity of America, p. 86: — "No European nation can serve us as an example, for none has encountered a problem so complicated and so vast. The nearest approach to its solution was made by the Roman Empire." And *ib.* introd. 9. "An imperial power has come into existence before our eyes. . . . There is before it a career of unparalleled grandeur, a splendid history, to be wrought out on a greater scale than that of Rome."

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Nation and Empire — how understood.

a modern one, developed since the decline of the feudal system in Europe. The Romans knew nothing of "nations" in this sense of the word. The Roman people, *populus Romanus*, that is, those who held the privileges of the city of Rome, never called themselves a nation, in any sense. The same may be said of all those with whom they engaged in war or recognized as "friends of the Roman people." They were more or less definite collections of various tribes, communities, or *gentes*, in the original sense of the word *gens*, whose corporate existence generally depended on the continuance of some city (*civitas*), in accordance with the ideas of all the Mediterranean States of antiquity; as was the case with those known to the Romans as the Carthaginians (*Cartaginienses*).[1]

The title "emperor" has, since the days of the first Napoleon, been sometimes used to designate the occupant of a position in the state not essentially different from that more commonly understood as the position of a king. But "empire" involves the idea of a political personality holding sovereignty, by right above law, which is exercised not merely over the people of a nation, but over other political personalities holding political power in a subject relation to such empire. Nationalism and Imperialism are therefore in opposition, as political principles.[2]

It would be interesting, at least, to know whether the writers referred to propose that the empire which they anticipate shall be exhibited in the subjection of the States, as political personalities, to the individuals elected

[1] For an essay of this sort there can be no better authority on this than that of Dr. Lieber, who was a leading advocate for the theory of *nationalism* as an *idea* controlling all modern political life. See fragments on "Nationalism," etc., in Vol. II. of his Miscellanies, pp. 222–242; and compare E. Mulford's The Nation, Ch. XVIII.

[2] "As despotic monarchs claiming the world for their realm, the Teutonic emperors strove from the first against three principles, over all of which their forerunners of the elder Rome had triumphed, — those of Nationality, Aristocracy, and Popular Freedom." — Bryce's Holy Roman Empire, 391.

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by the votes of their citizens, under existing forms of law to constitute the government at Washington. If any of them take the position of instructors in public law to the generation advancing to act in political life, they may justly be expected to declare themselves more explicitly.

If, however, they look to the coming empire as something to be exhibited in the political dominion of the United States over adjacent populations and countries now distinct and independent, it is a matter of prophetic vision which is not included in the scope of this essay.[1]

It is, however, true that empire, *imperium*, in the early sense of the Latin word, exists in every country of necessity, and its possessors must be known in each country wherein civil government is preferred to anarchy. It is not enough that the *forma regiminis* should be generally understood. To avoid civil dissensions, and fratricidal wars, it is even more essential that the *forma imperii* should be clearly recognized.[2]

As illustrating our own need of making this an object of general knowledge, I cite from remarks made by Mr. Garfield in the House, on an occasion not long before his nomination as candidate for the presidency. These will at the same time illustrate the practical political importance of many of the other distinctions which have herein been pointed out.

On the 27th June, 1879, during the extra session of the Forty-sixth Congress, the House, being in committee, was considering the bill making appropriation to pay the fees of United States marshals and their general depu-

[1] K. Hillebrand, Lectures on German Thought, p. 288: — "The new German patriotism, which is not to be confounded with the old Prussian, was not, and is not *naïf*. It is conscious; it is intentional; it has a tincture of pedantry because it has been made by scholars and literary men." A parallel may suggest itself to the American reader.

[2] *Ante*, pp. 293, 302.

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ties.[1] In the course of the debate, Mr. Garfield remarked: [2] —

"The majority in this Congress [3] have adopted what I consider very extreme and dangerous opinions on certain important constitutional questions. They have not only drifted back to their old attitude on the subject of State sovereignty, but they have pushed that doctrine much further than most of their predecessors ever went before, except during the period immediately preceding the war."

Mr. Garfield proceeded to cite, from the official reports of the debates, certain "declarations of seven distinguished members [senators] of the present Congress," of which he said: —

"They set forth what may be regarded as the doctrines of the Democracy as represented in this Capitol."

These doctrines Mr. Garfield afterwards summarized as follows: —

"They are in brief: first, there are no national elections; second, the United States has no voters; third, the States have the exclusive right to control all elections of members of Congress; fourth, the Senators and Representatives in Congress are State officers, or, as they have been called during the present session, 'embassadors' or 'agents' of the States; fifth, the United States has no authority to keep the peace anywhere within a State, and, in fact, has no peace to keep; sixth, the United States is not a nation endowed with sovereign power, but is a confederacy of States; seventh, the States are sovereignties possessing inherent supreme powers. They are older than the Union, and, as independent sovereignties, the State governments created the Union, and determined and limited the powers of the general Government."

[1] H. R. No. 2382. The matter in controversy being the constitutionality of the provisions of the statutes relating to elections for Representatives, which have been mentioned, *ante*, p. 386.

[2] Congressional Record, 46th Congress, p. 2388.

[3] The majority at that time, both in the House and Senate, being with the opposite party.

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Mr. Garfield's Remarks, June 27, 1879.

The speaker proceeded to indicate certain political measures of government which his opponents had advocated, and which he regarded as illustrating the practical bearing of these doctrines.

Mr. Garfield afterwards stated "briefly the counter-propositions." To the reader of the preceding pages there will be nothing novel in these, and they are *cited* here mainly with reference to remarks of the same speaker on another occasion, to show his combination of the historical with the revolutionary basis. His propositions were: —

"I affirm, first, that the Constitution of the United States was not created by the governments of the States, but was ordained and established by the only sovereign in this country, the common superior both of the States and the nation, — the people themselves; second, that the United States is a nation, having a government whose powers, as defined and limited by the Constitution, operate upon all the States in their corporate capacity, and upon all the people; third, that by its legislative, executive, and judicial authority the nation is armed with adequate power to enforce all the provisions of the Constitution against all opposition of individuals or of States, at all times, and all places within the Union."

For the purpose of this essay it is immaterial whether the summary given by the speaker of the positions taken by his political opponents was just or unjust. Intrinsically, as logical statements of doctrine, or historical descriptions of fact, that summary, and that afterwards given as "counter-propositions," are beneath criticism, from their vague, inconsistent, and misleading use of words. Like many other attempts in the same direction, they are not, either of them, more false than true, or more true than false.

The speaker then followed with a brief historical statement, to use his own words, of "the constitutional history of this country, or rather the history of sovereignty and government in this country," which he distinguished as "comprised in four sharply defined epochs."

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Of the periods so discriminated, the second is the most material, because determining all those following. In describing this period, the theory of sovereignty in the nation as a mass, and the history of the inception of that sovereignty, is asserted in these words: —

"Second, on the 4th day of July, 1776, the people of those colonies, asserting their natural right as sovereigns, withdrew the sovereignty from the Crown of Great Britain, and reserved it to themselves. In so far as they delegated this national authority at all, they delegated it to the Continental Congress assembled at Philadelphia. That Congress, by general consent, became the supreme government of this country, — executive, judicial, and legislative in one. During the whole of its existence it wielded the supreme power of the new nation."

In consequence of a similar exertion of sovereignty the people, so the speaker stated, established the government of the Confederation, and afterwards ordained and established the Constitution.[1]

Mr. Garfield, in order to sustain his position, commenced by taking the proper and only legitimate method to sustain his position, appealing, not to *authorities*, as a lawyer, but to facts, as an historian. This is in accordance with the method pursued in this treatise, and the only question is, here, whether *the facts* actually were as Mr. Garfield has represented them. He said: —

"That no one may charge that I pervert history to sustain my own theories, I call attention to the fact that not one of the colo-

[1] As remarked hereinbefore (p. 323, note), with regard to language of Mr. Jameson, anybody who is endowed with the courage to present such a statement as history is impregnable. And yet Mr. Garfield, on this same occasion, referring to decisions of the Supreme Court, could say (Record, p. 2390), "Chief Justice Marshall, that great judge, who found the Constitution paper, and made it a power, who found it a skeleton, and clothed it with flesh and blood. By his wisdom and genius he made it the potent and beneficent instrument for the government of a great nation." Here is not only a recognition of the fetish, but also evidence that the manufacturers, like makers of idols of brass, wood, and stone, set their private mark on their handiwork.

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nies declared itself free and independent. Neither Virginia nor Massachusetts threw off its allegiance to the British crown as a colony. This great declaration was made not even by all the colonies as colonies, but it was made in the name and by the authority of 'all [1] the good people of the colonies' as one people."

These sentences present another illustration of that tendency, in all controversy on this subject, to state doctrine as if it were history, which has herein already been noticed.[2] Mr. Garfield's statement is, apparently, that the colonies, as so many distinct political corporeities, were not the actors in effecting what we call the independence of the United States. His idea must be that the series of public acts which are recorded in every history of the United States as the acts of the pre-existing political organizations known as colonies, and afterwards as States, were not *their* acts at all; but, in spite of appearances and the record, were performed by a totally different set of actors.

As no proof of this is offered, the statement is merely that such is his doctrine; or that his doctrine requires such a view of history. Instead of showing *a fact*, he appeals to what, at the best, is only the record of a fact, and which is to be compared with other records. Like all of this school, he relies on the *words* of the Declaration, which, even if they could bear such an interpretation, are not of the slightest value as against the *fact* as it stands, — the fact that, except as the political people of each colony acted in their corporate capacity, there was no "good people of the colonies" to act at all.[3]

Mr. Garfield proceeded to fortify his position by citing

[1] The word "all" is introduced in the report of the debate by inadvertence, it must be supposed either of the speaker or the reporter, as it is not so in the Declaration.

[2] *Ante*, p. 99.

[3] Compare the argument on the words in the Preamble to the Constitution (*ante*, pp. 108–118); also Ch. IV., and pp. 837, 388.

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four leading "names" as sustaining his own view of history. As to some of these he was, I think, misled, as so many others have been, by his own preconceptions of the events, and still more by the double meaning of the phrases by which they have been described.

The first of these "names" or authorities, if they may be called such on a question of evidence, is an opinion which, as I read it, does not sustain that view of the facts. It is an opinion, indeed, which I claim as one agreeing with the view maintained in this essay, — that *the States*, being united, as matter of political fact, at the moment of *their* declaration of *their* independence, were, as united political personalities, — "the union," the sovereign, — the United States.

Mr. Garfield said, —

"Let me fortify this position by a great name, that will shine forever in the constellation of our southern sky, — the name of Charles Cotesworth Pinckney of South Carolina. He was a leading member of the Constitutional Convention of 1787, and also a member of the Convention of South Carolina which ratified the Constitution. In that latter convention the doctrine of State sovereignty found a few champions, and their attempt to prevent the adoption of the Constitution, because it established a supreme national government,[1] was rebuked by him in these memorable words."

Pinckney's argument was founded on the language of the Declaration of Independence. The quotation given by Mr. Garfield is from the report in Eliott's Debates, as follows: —

[1] The speaker's method of demonstration agrees with that of Story and the whole school. On a question of fact, the opinion of one member of a State convention, supposed to support the speaker's view, is selected as fortifying his position, and that of other members dismissed, because it does not. Mr. Garfield here also assumes that those who voted to adopt the Constitution understood it as he does, and as incompatible with the idea of federation between sovereign States, — which is another practical begging the question, as well as an inference well-known to be contradicted by the history of each State which adopted the Constitution.

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Mr. Garfield's Citation of Pinckney.

"This admirable manifesto, which for importance of matter and elegance of composition stands unrivalled, sufficiently confutes the honorable gentleman's doctrine of the *individual* sovereignty of the several States. In that declaration the several States are not even enumerated, but after reciting in nervous language our right to independence and the tyranny which compelled us to assert it, the declaration is made in these words, — 'We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare that these United Colonies are, and of right ought to be, Free and Independent States.' The *separate* independence and *individual*[1] sovereignty of the several States were never thought of by the enlightened band of patriots who framed this declaration. The several States are not even mentioned by name in any part of it, as if it was intended to impress this maxim on America, — that our freedom and independence arose from our union, and that without it we could neither be free nor independent. Let us, then, consider all attempts to weaken this union, by maintaining that each is *separately* and *individually* independent, as a species of political heresy, which can never benefit us, but may bring on us the most serious distresses."

Pinckney's interpretation of the language of the Declaration accords with the facts as they appear in history. "Our union," "this union" is here obviously equivalent to *our States, being united.* In the school of Story, or of his modern disciples, "union" is not the States united, nor

[1] Mr. G. T. Curtis, History of the Constitution (I. p. 455), says, "Pinckney entered the convention with a desire to adhere, if possible, to the characteristic principles of the Confederation." Mr. Curtis must suppose Pinckney to have at least recognized the States as personalities then holding the political power, even if he afterwards acquiesced in a consolidation under a constitution. The *italics* in the above citation of Pinckney's language are mine. As it stands in 4 Elliot's Debates, p. 301, the words FREE AND INDEPENDENT STATES are printed in capitals, and so stand as engrossed in the original Declaration, signed Aug. 2, 1776 (Am. Archives V. p. 1598), — a circumstance which may be important to a school whose main argument is in writing "National" with a big N.

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the United States, but only a name for something represented solely by a National government. Their interpretation of the words "in the name of the good people of these colonies" does not accord with the facts. As has herein been said with reference to a similar argument from the language of the Constitution, as this is a question of history, the *words* of the Declaration are not of the slightest value as compared with the undisputed facts.[1]

Mr. Garfield proceeded to say, —

"For a further and equally powerful vindication of the same view, I refer to the Commentaries of Judge Story, Vol. I. p. 197.

"In this same connection, and as a pertinent and effective response to the Democratic doctrines quoted in the outset, I quote from the first annual message of Abraham Lincoln, than whom no man of our generation studied the origin of the Union more profoundly. He said 'Our States,'" etc.

As I have already herein remarked, more than once, I do not pretend to know what Judge Story understood by "the Union" and by "the people of the United States";[2] and, whatever he may have understood by those terms, his opinion on a question of history is no more *testimony* as to the facts than is the opinion of anybody else.

Mr. Lincoln's language I have already cited,[3] as indicating that he perhaps accepted that view of the facts which I have sustained as the true one.

Mr. Garfield ended his climax of "names" as follows: —

"In further enforcement of the doctrine that the State governments were not the sovereigns who created this Government,[4] I

[1] *Ante*, p. 130. [2] *Ante*, p. 109. [3] *Ante*, p. 142.

[4] If it did not escape observation, by having become one of its commonplaces, it might be called one of the sophistries of this school, that they charge their opponents with attributing sovereignty to the State *governments*; that is, — to the persons elected by the voters in each State, for fixed periods of time, to administer the executive, legislative, and judicial powers, as if they had no other idea of the State which they speak of as one of a confederation.

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James Wilson cited by Mr. Garfield.

refer to the great decision of the Supreme Court of the United States in the case of Chisholm *v.* The State of Georgia, reported in 2 Dallas, — a decision replete with the most enlightened national spirit, in which the court stamps with its indignant condemnation the notion that the State of Georgia was 'sovereign' in any sense that made it independent of or superior to the nation.

"Mr. Justice Wilson said, 'As a judge of this court, I know, and can decide upon the knowledge,[1] that the citizens of Georgia when they acted upon the large scale of the Union as a part of the "people of the United States" did not surrender the supreme or sovereign power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is not a sovereign State. . . . Whoever considers in a combined and comprehensive view the general texture of the Constitution will be satisfied that the people of the United States intended to form themselves into a nation for national purposes. They instituted for such purposes a National Government complete in all its parts, with powers legislative, executive, and judiciary, and in all those powers extending over the whole nation. Is it congruous that, with regard to such purposes, any man or body of men, any persons, natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the National government?'"

Thus far Mr. Garfield in his citation of this case, — the *cheval de bataille* of his school. Whether a decision ren-

This is a misrepresentation of the State-rights doctrine, which recognized "the people" of each State, in some sense or other, distinguished from "the government," as the holder of supreme power. Compare *ante*, pp. 121, 124, n.

[1] It would seem that Judge Wilson thought himself qualified by his office to decide upon the historical question where that sovereignty was located which gave him his commission. This was evidently beyond the capacity of the judicial function. (*Ante*, p. 5.) As a citizen, he was obliged to recognize some sovereign before he could, as a judge, apply the Constitution as law. In the opinion here cited Wilson argues as if the position of a State of the United States were determinable from the Constitution itself, as law; "taking a combined and comprehensive view," whatever that may be. But Mr. Garfield presents the same opinion as authority on a question of fact antedating both the Constitution and the Confederation, that is, whether the States held sovereignty in 1776. And on this question Wilson's testimony is against Mr. Garfield's view, as will appear from what follows, *post*, pp. 485–487.

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dered in a case in which the Supreme Court appears in the position of utter failure on the point of actual power can be called a "great decision" must be a matter of taste. The validity of the claims made for the *opinions* in this case, as *judicial* authority on a question of political fact, have already been considered.[1]

I have already argued that the opinions delivered in this case have no political value, because the decision of the court never had any effect on the matter in controversy.[2] But, conceding all the *prestige* claimed for that of Judge Wilson, it is not at all clear from the passages cited that they indicate that view of history in support of which they were quoted by Mr. Garfield. It is not by any means apparent, in this opinion, that Judge Wilson did not recognize the citizens of Georgia — either the whole population or the voters — as constituting a sovereign "people," or a sovereign State. The passages cited may support the idea that they, as holders of all the powers of sovereignty in and for their State, when they adopted the Constitution, made a division of them, granting or delegating some to a State government, and reserving others, to be granted or delegated by them, separately, or simultaneously with a like grant from other States, to a Government for those purposes which Wilson here called "National."

But if Judge Wilson was here cited for his "name" or reputation, and not merely as a judge on the bench, we may recall the fact that he has left other records of his opinions on this subject.

Mr. G. T. Curtis devotes Chapter XIV. of Book III. of

[1] *Ante*, p. 137. Mr. Garfield's argument was made in the course of a heated debate, but it compares well, for intrinsic force, with any more deliberately composed by jurists of the same school. It equally justifies the remark of the English critic, that the argument rests "on the reputation of its advocates" (*ante*, p. 312, n. 3), and it equally illustrates how the reputation of its advocates rests upon their adoption of the argument.

[2] Compare *ante*, p. 138.

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his work on the History of the Constitution to a sketch of Wilson and a statement of his views, and says of him, Vol. I. p. 463 : —

"During the war he had always considered the States, with respect to that war, as forming one community[1] and he did not admit the idea that when the Colonies became independent of Great Britain, they became independent of each other.[2] From the Declaration of Independence he deduced the doctrine that the States by which that measure was adopted were independent in their confederated character and not as individual communities. This rather subtile distinction may seem now to have been of no practical moment,[3] since the confederation had actually united the States as such, rather than the inhabitants of the States."

The remainder of Mr. Curtis's account of Wilson's views relates to his conception of the transaction called the adoption of the Constitution.[4] But if Mr. Curtis has here given a correct description of Wilson's view of the history of the States before that event, his name cannot be invoked to support Mr. Garfield and the modern nationalists in their attribution of sovereignty to the mass of the inhabitants of the thirteen colonies at the Revolution.

I think I may fairly claim that, on the contrary, Wilson's opinion supports the view presented in this essay. The weak point of his conception of the circumstances was one common to all the theorists of his time,[5] and is found

[1] Refers to Madison, Elliot, v. 78.

[2] Refers *Ibid.* 213.

[3] But compare *ante*, p. 128.

[4] Mr. Curtis has also given extracts from Wilson's speech on the adoption of the Constitution. They seem to agree with the view sustained by Mr. Curtis, of a perpetual grant by the States, to somebody, of a portion of their sovereignty. Compare *ante*, pp. 101, 102.

[5] Compare *ante*, pp. 122, 124, and see the citations from Chisholm *v.* Georgia, *ante*, p. 329, n. In a Centennial Address, July 4, 1876, at New York, the Rev. R. S. Storrs, Jr., said (p. 21), "There was certainly nothing of the ideal heroic among the *ante*-revolutionary people of this country. They did not live for sentiment or on it. They were not *doctrinaires*, though they are sometimes so represented." The orator might have said truly that even the leaders,

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in this, — that he attributed the possession of sovereignty, *a priori*, to all the inhabitants of a certain district called "a State," though he was conscious, *a posteriori*, that is, by knowing what took place every day before his eyes, that only a portion of these, a comparatively few individuals, determined by laws derived from themselves corporately, actually, as voters, held all the political power that was to be held. The distinction, made by Wilson, of the States as holding sovereignty only in union is, in my opinion, that which gives the key to our political existence. But if sovereignty is attributed *a priori* to all the inhabitants of a State, it would be a "rather subtile distinction," as Mr. Curtis calls it; for there would be no reason, *a priori*, why the whole mass of the inhabitants of the country, instead of thirteen separate masses, should not be considered the possessor of sovereignty.

To have any consistency as a statement of political doctrine, the "counter propositions" offered [1] by Mr. Garfield must be understood to mean that "the Union," which is therein called permanently supreme, is not found in

the so-called "fathers and founders," were not *doctrinaires* in reality, though they constantly so represented themselves, and really supposed that they were such. Compare *ante*, pp. 297, 314.

[1] On the 13th January, 1865, in a debate on a proposal for a constitutional amendment to prohibit slavery, Mr. Garfield had presented the same theory of sovereignty of the entire population as one mass, stating "that the moment the revolutionary Congress assumed national prerogatives, and the people by their silence consented, that moment the people of the colonies constituted a nation and that revolutionary Congress was the authorized Government of that nation. But the Declaration of Independence was 'by the authority of the good people' and hence it was their declaration. . . . The sovereignty of this people was first lodged in the revolutionary Congress, and it continued there until the 1st day of March, 1781, when they lodged it in the Articles of Confederation. They established then a confederacy properly so-called. . . . On the 21st day of June, 1788, a new lodgment of this sovereignty of the American people was made. It was then lodged in this Constitution," etc. Cong. Globe, 2d Sess. 38th Cong. p. 264. This argument, or method, of knowing the will of a sovereign people from "their silence" resembles that from "acquiescence and obedience of the people," *ante*, pp. 316, 348, n.

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Conversation of Bismarck and Grant.

the States in their voluntary union, but in *a government* regulated by its own interpretation of a written Constitution, supposed to act of its own intrinsic authority as a law for States and natural persons, without reference to any political choice on the part of those States which are known in international relations as "the United States," [1] and that the only sovereign external to that Constitution is a hypothetical nation, whose will is known only by the action of the political party controlling the general Government in accordance with this theory.

For any who have followed the argument of this essay it will be, I hope, superfluous to remark that I regard this statement of history as entirely baseless, and this statement of political doctrine as contradicted by the actual political experiences of the country; unless what has happened since 1861 records a revolutionary change in the seat of sovereign power.[2]

But such a statement is only one illustration among many of the consequences which the theory attributed to Story and Webster, and now represented by Mr. Pomeroy and others, already cited, involves, and which are exposed when that theory is used to explain the events of the war and of the Reconstruction era.

The following conversation is reported to have taken place between General Grant and Prince Bismarck, the Chancellor of the German Empire.[3]

[1] That the States are so recognized, see *ante*, pp. 315–319.

[2] When Mr. Garfield had finished his remarks on this occasion, Mr. Frank H. Hurd, also a member from the State of Ohio, obtaining the floor, said, "My colleague has seen fit to enter upon a disquisition as to the nature of the Federal government and the relations of the States to that government under the Constitution which they created. Never, in all my studies of the political history of this country, never, in all my knowledge of the political debates which have taken place in the Congress of the United States, have I heard such views of consolidation advanced as have been suggested to-day by that gentleman." Cong. Record, 46th Cong. pp. 23–90.

[3] June, 1878, Around the World with General Grant, by J. R. Young, Vol. I. p. 416.

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Language of Grant and Bismarck.

"'Yes,' said the Prince, 'you had to save the Union, just as we had to save Germany.'

"'Not only save the Union, but destroy slavery,' answered the General.

"'I suppose, however, the Union was the real sentiment, the dominant sentiment?' said the Prince.

"'In the beginning, yes,' said the General; 'but as soon as slavery fired upon the flag, it was felt — we all felt, even those who did not object to slaves — that slavery must be destroyed. We felt that it was a stain to the Union that men should be bought and sold like cattle.'"

It is not an unreasonable inference from this dialogue that the questioner understood the subject somewhat better than did the respondent. But this does not appear so much from the former's mention of *saving the Union*, as being the main object of the war, as from his supposing a parallel in it with the experiences of Germany.

The phrases "to save Germany" and "to save the Union" are each figures of speech, and, as such, necessarily liable to mislead. The expression that our civil war was a war to *preserve the Union* is especially deceptive. It has been generally understood as meaning that the object of the war, as carried on under the leadership of the general Government, was to compel eleven States, as so many distinct political personalities, to remain united with other similar States, from which they desired to separate themselves.

The object of this essay has been to show that this end was not the end needed, and, moreover, that, as matter of fact, it was not the result attained.

The Union did not require saving, in that sense; because, if saved in that sense, it was not a *union* at all. For, in that sense, it was subjugation of one set of States by another, and the possibility of any rebellion or treason on the part of anybody in those eleven States was excluded.[1]

The Union did not require saving, because the United

[1] Compare *ante*, p. 286, concluding chapter viii.

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States were to be found in those States exclusively which continued in the former voluntary union, in which alone each and any or every State had been, or could continue to be, a State of the United States.

But the Union was to be saved in this sense, — that the sovereignty of the United States, that is, of the States continuing in their voluntary union (not the authority of the general Government, except as their agent, still less of the Constitution as a self-existing law) was to be maintained throughout the whole domain which had ever been under that sovereignty, — a domain identical with the whole domain of the United States when those eleven States were participants of the same sovereignty.[1]

In the same sense, Germany had to be saved, or was saved, because a political personality, or aggregate of political personalities, at the head of which was the King of Prussia, maintained and extended their political authority thoughout the country which is now known as the German Empire; not only over the domain which they had held severally before the war, but over the outlying domains of other political personalities, who were treated by them as having abdicated or dispossessed themselves of authority in those territories which, as sovereigns of a united Germany, the King of Prussia and his allies claimed as parts of one country under their dominion.

Supposing this parallel in the mind of the German who had been the chief instrument in effecting this *saving* Germany by making Prussia or its hereditary dynasty the sovereign of a Germany so saved, one may understand what Bismarck meant by saying — "you had to save the Union" and "the Union was the dominant sentiment."

Any European statesman would know that if the war in America was a civil war, — not an international war, nor yet a huge riot, — there was necessarily some actual political personality, who might be one natural person, or a collection

[1] *Ante*, p. 145.

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of natural persons holding sovereignty as a unit, who, as sovereign, was putting down the resistance of rebellious subjects, — not subject *states*, but subject natural persons.

He would know, moreover, that the question whether slavery was good or bad, whether it was morally right or wrong "to buy and sell men like cattle," had nothing to do with the questions of allegiance, treason, and rebellion.

Earl Russell at the beginning of the war said, "The struggle is now felt to be one for independence on the part of the South, and for empire on the part of the North." This terse expression was essentially true. For the Northern States, being "The United States," contended to maintain their sovereignty, their *imperium*, in the original sense of the word, which applies as well to republics as to monarchies.[1] The populations of the South contended to break from this *imperium* and to make for themselves a confederacy of independent States. There would have been no mystery about this, if explained to any European publicist.

Can it be inferred from the replies of the American General, that, if "the flag" had been "fired upon" from the soil of a non-slave-holding State, he could not have told who or what directed the shot, or would have been at a loss to know what were his obligations as a soldier? Can it be that he regarded himself as having been only the military chief of a crowd of citizens in arms, known simply as "we," who, being individually opposed to slavery, were knocking others in the head because they differed from them about "buying and selling men like cattle"?

The man who sheds the blood of his fellow-men without the warrant of a political sovereign, simply to make others accept his own ideas of political or social justice, is, by the common jurisprudence of the world, an outlaw on land and a pirate by sea.[2]

[1] Compare Dr. Maine, *ante*, p. 329.

[2] Yet upon this basis Mr. Garfield appeared to wish to rest, in his speech

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View in Stephen's Liberty, Equality, and Fraternity.

If this was the true view of our case, the war was a huge riot, and Carlyle was justified in comparing it to the burning out of a foul chimney.

That the conflict of opinions in individual minds, as to the desirability of nationality or its opposites, or as to the moral aspect of slavery or its contraries, had nothing to do with the essential question of the right of the government at Washington to resist secession as rebellion, — appears from the fact that their opinions on these points determined the sympathies of outside observers, who did not understand the real political situation, but who regarded our civil war as essentially an international war, — a war between two sets of states, equally capable of belligerency, because equally independent in respect to each other.

It is highly probable that this has been the view generally accepted in England,[1] and, though I do not feel certain as to the author's own conception of our case, I refer to Sir James Fitzjames Stephen's "Liberty, Equality, and Fraternity" as showing the probability of this, in some passages which I propose to cite, not for this only, but as also showing the true meaning of such phrases as "settled by the war" and *ultima ratio regum*, when used to explain a civil contest.

In the fourth chapter, entitled "The Doctrine of Liberty in its Relations to Morals," this author (page 164 of the American reprint) observes: —

"I have now said what I had to say on the action of law and of public opinion in regard to the encouragement of virtue and the prevention of vice. . . .

June 27, 1879, notwithstanding his argument from history. He said, "But the truth requires me to say that there is one indisputable ground of agreement on which alone we can stand together, and that is this: — the war for the Union was right, everlastingly right, and the war against the Union was wrong, everlastingly wrong." Cong. Rec. 46th Cong. p. 2390.

[1] How far Mr. G. T. Curtis may have succeeded in convincing his English friends of the rights of the matter by his theory of the divisibility of sovereignty I do not pretend to judge. Compare *ante*, p. 299.

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"Before taking leave of this part of the subject, I will make some observations upon a topic closely connected with it, — I mean the compulsion which is continually exercised by men over each other in the sternest of all possible shapes, — war and conquest. The effect of these processes upon all that interests men as such can hardly be overrated. War and conquest determine all the great questions of politics and exercise a nearly decisive influence in many cases upon religion and morals. We are what we are because Holland and England in the sixteenth century defeated Spain, and because Gustavus Adolphus and others successfully resisted the Empire in Northern Germany. Popular prejudice and true political insight agree in feeling and thinking that the moral and religious issues decided at Sadowa and Sedan were more important than the political issues. Here, then, we have compulsion on a gigantic scale producing vast and durable political, moral, and religious effects.

. . . . .

"When, however, we come to consider the relations of independent nations to each other, a totally different set of considerations present themselves. Nations have no common superior. Their relations do not admit of being defined with the accuracy which the application of criminal law requires, nor, if they were so defined, would it be possible to specify or to inflict the sanctions of criminal law. The result of this is that nations always do consider for themselves in every particular case as it arises how their interests are to be asserted and protected, and whether or not at the expense of war. Even in the case of such references to arbitration as we have lately seen this is true. The arbitrators derive their whole authority from the will of the parties, and their award derives its authority from the same source.

"Such being the relations between nation and nation, all history, and especially all modern history, shows that what happens in one nation affects other nations powerfully and directly. Indeed, the question what a nation is to be — how much or how little territory, how many or how few persons, it is to comprehend — depends largely on the state of other nations. A territory more or less compact, inhabited by a population more or less homogeneous, is what we mean by a nation; but how is it to be determined where the lines are to be drawn? Who is to say whether the Rhine or the Vosges is to divide France from

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Germany? — whether the English and the Welsh, the Scotch and the Irish, are or are not homogeneous enough to form one body politic? To these questions one answer only can be given, and that is, Force, in the widest sense of the word, must decide the question. By this I mean to include moral, intellectual, and physical force, and the power and attractiveness of the beliefs and ideas by which different nations are animated. All great wars are to a greater or less extent wars of principle and sentiment; all great conquests embrace more or less of a moral element. Given such ideas as those of Protestants and Catholics in the sixteenth century suddenly seizing upon the nations of Europe, religious wars were inevitable;[1] and in estimating their character we must take into account not merely the question, Who was on the offensive? Who struck the first blow? but much more the question, Which of the conflicting theories of life, which of the opposing principles brought into collision, was the noblest, the truest, the best fitted for the development of the powers of human nature, most in harmony with the facts which surround and constitute human life?"

I think it appears clearly from the above, as well as from the whole tenor of the author's remarks in this connection, that he is speaking of the moral justification of *war* properly so called, — *war* looked upon as an *international* relation. His reference is to wars carried on by one legitimate possessor of political power against another legitimate possessor of political power; wars which may result in the subjugation or conquest of one of the parties belligerent by the other; wars which may be followed by a *change* of dominion, a *transfer* of territory and population from the rule of one political sovereign to that of another. He is speaking of wars which, whatever may be the motives, desires, or hopes of the contending parties, are carried on without any question of the duty of the subjects or citizens

[1] These wars were none the less international wars, wars between political organizations or states of some kind. They were not wars between so many thousand Catholics and so many thousand Protestants. Their respective creeds did not determine the political obligations of the citizens or subjects of the different states engaged in these wars.

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of each towards their respective sovereigns, or states, as the parties conducting the war; of wars which, even if they can be called religious wars, or wars of sentiment, are wars from which all ideas of revolution, on the part of the prevailing party, and of rebellion, on the part of the defeated party, are absolutely excluded.

He is speaking of force or compulsion; and in this place he distinguishes it from the force or compulsion which he had been indicating as the foundation of law, — that force or compulsion which is the foundation, according to his belief, of each and every state, nation, or political community, as distinguished from foundations in the consent of the governed or in Mr. Mill's theory of general utility.[1]

Immediately after the passage above quoted Sir James Stephen says: —

"The most pointed and instructive modern illustration of this that can possibly be given is supplied by the great American civil war. Who, looking at the matter dispassionately, can fail to perceive the vanity and folly of the attempt to decide the question between the North and the South by lawyers' metaphysics about the true nature of sovereignty or by conveyancing subtleties about the meaning of the Constitution and the principles by which written documents ought to be interpreted? You might as well try to infer the fortunes of a battle from the shape of the firearms. The true question is, What was the real gist and essence of the dispute? What were the two sides really fighting for? Various answers may be given to these questions which I need neither specify nor discuss, but the answer to them which happens to be preferred will, I think, settle conclusively the question which way the sympathies of the person who accepts that answer should go."

From this paragraph I infer that, while the author probably sympathized with one or the other of those whom he indicates by the terms "the North" and "the South," he had accepted, without a doubt on that point, that theory

[1] Sir James Stephen's book is written avowedly in oppposition to Mill's Essay on Liberty.

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of the war which had always been and which still is advanced by those whom he knows as "the South"; that is, I infer that he regards the war as an inter-*state* war, a war carried on between two equally legitimate sovereigns. In this, he probably agrees with the vast majority of all Englishmen who have noticed the subject, to whichever side their sympathies may have inclined.[1]

Taking this view, he is perfectly consistent in scouting all considerations of the meaning of the Constitution as law, or of its interpretation as a written document. To his mind, it could not be a law or a statute; it was a treaty-compact only, and law so long as it was a treaty subsisting by the will of both parties; but no longer. Those who, to his mind, made it had, to his mind, dissolved it.

In this essay, I also have endeavored to show that the position of the parties to the war could not be settled by the Constitution, nor by any constitution, regarded as law. I have tried to show that the question — whether the Southern theory of our national existence was the true one, or some other view, inconsistent with the claim of secession and with the existence of such a war as Sir James supposed — is not determinable by "lawyers' metaphysics" about the divisibility of sovereignty and "conveyancing subtleties about the meaning of the Constitution," but is simply a historical question.

That foreigners have never understood this is not their fault. The fault was with our fathers and "the founders"

[1] For illustration I refer to "A Letter to a Whig Member of the Southern Independence Association" (an English affair), by Goldwin Smith. 1864. Boston edition. Ticknor & Fields. In this, the author founded his argument entirely on the question of sympathy with or against slavery. He used the term "the Americans," throughout, as meaning only the Northern States: — "The Americans, I fully grant, were entitled to no sympathy while they remained accomplices with slavery," p. 24. Though, against Earl Russell's expression (*ante*, p. 491), he asserted that the war was carried on, on the part of the North, to "maintain the existing Union," he, throughout, spoke of it as a "Federal" union, and repeatedly asserted that, but for the emancipation question, he was opposed to the war and favored a peaceable separation. *Ib.* pp. 25, 27. Compare also, *ante*, pp. 56, 57.

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and with ourselves. Our fathers never knew, or never told, what they meant by "the United States,"[1] and we have not, to this day, succeeded in making other people understand what we mean by the words. Perhaps we ourselves do not know.

But the sentences which, in Stephen's treatise, follow those last cited have a more direct application to our circumstances. Though they are simple common-sense, they, as declaration of principle on which all nations must rest, outweigh all "the glittering generalities" our fathers could pick up from the rubbish of the eighteenth-century philosophy. The author's conclusion is, —

"It seems, then, that compulsion in its most formidable shape and on the most extensive scale — the compulsion of war — is one of the principles which lie at the root of national existence. It determines whether nations are to be what they are to be. It decides what men shall believe, how they shall live, in what mould their religion, law, morals, and the whole tone of their lives shall be cast. It is the *ratio ultima* not only of kings, but of human society in all its shapes. It determines precisely, for one thing, how much and how little individual liberty is to be left to exist at any specific time and place.

"From this great truth flow many consequences, some of which I have already referred to. They may all be summed up in this one, that power precedes liberty — that liberty, from the very nature of things, is dependent upon power; and that it is only under the protection of a powerful, well-organized, and intelligent government that any liberty can exist at all."

A *government* in this sense — a government which is the cause and not the effect of liberty — is a government not under law, but above law; a government which is not under a constitution, but above all constitution; which makes or grants constitutions, so far there are any constitutions.[2]

[1] *Ante*, p. 297.

[2] Constitutions, if they are to exist at all, must exist by the will and act of some pre-existing power-holders. To suppose them to originate in the will or

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that time a member from the same State, took the leading part against Mr. Long, and in the course of the debate said:[1] —

"But the gentleman takes higher ground, and in that I agree with him, namely, that five millions or eight millions of people possess the right of revolution. Grant it; we agree there. If fifty men can make a revolution successful, they have the right of revolution. If one State wishes to break its connection with the Federal Government and does it by force maintaining itself, it is an independent State. If the eleven Southern States are determined to secede, to revolutionize, and can maintain that revolution by force, they have the revolutionary right to do so. Grant it, I stand on that platform with the gentleman.

"And now the question comes, Is it our constitutional duty to let them do it?"

After some remarks, picturing the consequences to be anticipated from recognizing the separation of the Northern and Southern States, and drawing a parallel between coercion exercised to maintain them in union, and coercion as an ordinary incident of all municipal laws, criminal or civil,[2] Mr. Garfield said: —

"I said a little while ago that I accepted the proposition of the gentleman, that the rebels had the right of revolution; and the decisive issue between us and the rebellion is whether they shall revolutionize and destroy or we shall subdue and preserve.

"We take the latter ground. We take the common weapons of war to meet them; and if these be not sufficient, I would take any element which will overwhelm and destroy; I would sacrifice the dearest and best beloved; I would take all the old sanctions of law and the Constitution and fling them to the winds, if necessary, rather than let the nation be torn in pieces and its people destroyed with endless ruin."

Here, Mr. Garfield, while recognizing a right of revolution, in some sense of the word "right," avoided the natural

[1] 38th Cong. 1st Sess. Cong. Globe, 1503. [2] To be cited *post*, p. 502.

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conclusion that it should be accepted as such, or that he, at least, would acquiesce in the desired political change. For he claimed an antagonistic right to resist it, — not a legal right to resist it, but a counter-revolutionary right.[1] In this he appeared to abandon all question of duty to a recognized political superior and to make the question of political expediency between himself and anybody else depend simply on the issue of brute force.

However absurd, logically speaking, the position may seem that one may have a *right* which it is the *duty* of some one else to resist, Mr. Garfield's position in this debate illustrates the truth that it is the fact of success only that makes revolution a right in any sense worth noticing. He proposed to treat any resistance to the Government, whether it came from few or from many, as rebellion, as long as it was unsuccessful, and to recognize it as rightful if that resistance could not be put down.

But there are very few, probably, among those who speak of "the right of revolution" who would be equally candid. It is more common to conceive of revolution as a right attributable only to the entire population of some more or less considerable territory, and as one which, if claimed by such an entire population, or by some indefinitely large majority in such population, ought, in view of American public law at least, to be recognized at once, without resistance on the part of any previous possessor of political power over the same territory.[2]

[1] Compare Jameson's Const. Conv. § 111, on "counter-revolutionary acts."

[2] At the outbreak of the secession movement, this notion of a right of revolution had more or less effect in disturbing the judgments of people at the North without reference to their sympathy with or opposition to the State rights theory. In the debate on Mr. Long's expulsion, Mr. S. S. Cox, a representative from Ohio, defending Mr. Long, April 8, 1864, caused to be read, from the clerk's desk, various extracts from the New York Tribune in the years 1860 and 1861, with others from speeches by Mr. Wade, of Ohio, in the 34th Congress, and by Mr. Lincoln, in 1848, all asserting revolution as

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To this conception of revolution as a right may be attributed the origin of that hypothesis which ascribes the possession of sovereignty, at the moment of the Revolution of 1776, to the entire mass of the population as distinguished from the States or from the political peoples of the States, either united or several.

The argument seems to be that any transfer of sovereignty which we may rightly call a revolution must not be regarded simply as historical fact, but as a transaction resting on some law or principle of political morality; that such a transfer by revolution is so sanctioned only as the right or faculty of the entire mass of the population without reference to any pre-existing political organization; and that as the transaction occurring in 1776 has been accepted as revolution, it must now be recognized by everybody as the act of the entire mass of the population, in distinction from the act of the States or pre-existing colonies.[1]

But the truth is that this American Revolution of 1776 has its place in history simply as a fact, without any reference to legal or ethical justification. It is one fact in a class of facts which includes many others which are known in history as usurpations. Whether called revolutions or usurpations, they are equally, in their essence, only changes in the location of sovereign power, which as facts are rec-

a right on which secession might be recognized. (Globe, 1508.) Others, equally opposed to the secession of the slave States, had professed readiness to recognize it as revolution if the slave population could be shown to have united in the movement.

[1] Thus Story, Comm. § 211, says of the Declaration, "It was an act of original inherent sovereignty by the people themselves, resulting from their right to change the form of government and to institute a new one whenever necessary for their safety and happiness." Adding, "So the Declaration of Independence treats it," which sentence furnishes another illustration of putting the cart before the horse. (*Ante*, p. 96, n.) The same idea is indeed the basis of all Story's sophistical misrepresentation of history, which, as being such, was fully exposed by Judge Upshur in his review published in 1840; though Upshur himself was equally in error by regarding the States as each sovereign independently of their union.

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ognized without reference to the ethical or legal relations of those who effected them. To speak of "a right of revolution" as if it could be right existing in a legal relation, is a contradiction in terms; and no ethical justification for attempting a revolution can have anything to do with the question whether the attempt shall result in an unsuccessful rebellion or in a successful revolution.

It was therefore natural enough that Mr. Garfield in this debate should not adhere very closely to this revolutionary position, but should in some places easily slip back to the lawyer's point of view.

Referring again to Mr. Long's argument, Mr. Garfield said:[1] —

"The gentleman has told us that there is no such thing as coercion justifiable under the Constitution. I ask him for a moment to reflect that no statute ever was enforced without coercion. It is the basis of every law in the universe, — God's law as well as man's law. A law is no law without coercion behind it."

The speaker proceeded to draw a parallel between coercion in cases of ordinary execution under civil and criminal law, and coercion in the action of the Government against the eleven States, as such.

But for his argument on this occasion, as against Mr. Long, Mr. Garfield should have explained whether the coercion he was justifying was the coercion of revolutionary force or that of municipal law.

I have already cited some passages from Sir James Stephen's work, to the effect that coercion in some form is the foundation not only of law but of liberty.[2] After the sentences last quoted, that author proceeds to say: —

"I will not insist further upon this, but I would point out that the manner in which war is conducted is worthy of much greater atten-

[1] 1st Sess. 38th Cong. Globe, 1504; *ante*, p. 499.

[2] *Ante*, p. 497.

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tion than it has received, as illustrating the character and limits of the struggles of civil life. The points to be noticed are two. In the first place, in war, defeat after fair fight inflicts no disgrace, and the cheerful acceptance of defeat is in many cases the part of honorable and high-spirited men. Not many years ago an account was published of a great review held by the Emperor of Russia. Schamyl, who had so long defied him in the Caucasus, was said to have come forward and declared that as the Emperor had had no more obstinate enemy, so he should now have no more faithful subject than himself; that he saw that it was God's will that Russia should rule, and that he knew how to submit himself to the will of God. If the story was true and the speech sincere, it was the speech of a wise, good, and brave man."

No argument is needed to show that the coercion of municipal law has a very different character for those who are subjected to it, since it involves more or less of disgrace by involving more or less the idea of punishment.

Mr. Long and many others in the Northern States, undoubtedly, as well as the people of the Southern States, regarded the action of the Government simply as the coercion of war, — of war between two distinct political personalities, — whether they thought it coercion under the Constitution or outside of it. From their point of view the question always was whether the prospect of military success, and the probable consequences of such success, if attained, rendered the continuation of the war expedient for the people of the Northern States.

It is one of the unfortunate accidents of human existence that, while revolutions must be expected to occur, the coercion which they involve partakes of the character both of the coercion of war and the coercion of municipal law. Logically, it seems absurd that those who resist political change for being rebellion or usurpation should themselves suffer as rebels when the rebellion or usurpation results in a successful revolution. But, as no revolution

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can take place without the question of success being for some time in doubt, the practical consequence is that the coercion exercised in achieving it has more or less of the character of punishment.[1]

Mr. Garfield may at times have presented the action of the Government, in reference to the eleven States at least, if not in reference to the people of the whole country, as being revolutionary coercion analogous to the coercion of war; but the great bulk of those who sustained the Government during the war may be assumed to have, thus far, regarded that action as the enforcement of pre-existing political authority against a rebellion.

But the difficulty which all such persons experienced throughout the discussions caused by the war was to present this as founded on a consistent political basis.

As between himself and his opponents on this particular occasion, Mr. Garfield's argument, in drawing a parallel with coercion under municipal law, was simply begging the question, though neither side appeared to be aware of it. The first thing which should have been settled between them was what sort of coercion was the coercion to which they severally referred.

That the participants in this debate should have failed to notice this in their mutual recriminations is mainly at-

[1] A resolution of the Virginia Legislature of Dec. 17, 1782, which Mr. Garfield recited in his remarks on confiscation, Jan. 28, 1864, 1st Sess. 38th Cong. Globe, 403, shows that our revolutionary predecessors were quite as much embarrassed in reconciling law and revolution. As given in the Journal of the House of Delegates, the resolution reads: — "That the laws of this State, confiscating property held under the laws of the former government (which have been dissolved and made void), by those who have never been admitted into the present social compact, being founded on legal principles, were strongly dictated by that principle of common justice, which demands that, if virtuous citizens, in defence of their natural and constitutional rights, risk their life, liberty, and property on their success, the vicious citizens who side with tyranny and oppression or who cloak themselves under the mask of neutrality, should at least hazard their property, and not enjoy the benefits procured by the labors and dangers of those whose destructions they wished."

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tributable to their introduction of this entirely irrelevant and logically absurd theory of a right of revolution.

Any new possession of sovereignty being once established as fact, it is equally necessary, as in the case of a conquest in war, for everybody to make the best of it. Viewed as matter of strict justice, there can be no more disgrace under the coercion of revolution than under the coercion of war, though the former will have more or less of the character of punitory law, according to the nature of the revolution and the temper of the times.

If the result of the civil war has been the establishment of a national government upon a new location of sovereign power, it is the part of wisdom as well as of necessity to accept the fact as such, whatever views one may have had of one's political duty before the war. Even those who would resist it as usurpation may accept its success as indicating that it has been the will of God or decree of Providence, as they might accept the result of an international conquest. Those who, whether by revolution or usurpation, may have acquired power unknown under the former constitution will have the political right to punish any who may resist it. Those who, while viewing it as their own act in revolution or usurpation, justify themselves to themselves by attributing the result to divine interposition —if any such there have been — must take the chance, under the verdict of history, of a record either as knaves or as fanatics.

But if the idea of a change in the location of supreme power by a revolution is rejected, and if it is assumed that the position of each person living within the United States, in respect to political allegiance, is the same now as it was before, it is of the essence of the whole question to know whether the coercion which Mr. Garfield was defending was the coercion of war or that of municipal law. If it was the former, the right of secession, or, rather, the

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State's capacity to wage war for that end, or any end, is established by the war itself.[1] If it was the coercion of municipal law, the duty of the citizen is no clearer now than it was before; because nobody has yet explained how the acts of the Government can be reconciled with that supposition.

Very probably Mr. Garfield and others would say that the revolution they speak of consists in the changes in the municipal law itself under the will of the pre-existing sovereign, — changes of law in respect to social and economical relations, without any change in the location of supreme legislative power. This may also be the prevailing idea in those utterances from judicial, legislative, and executive sources which have hereinbefore been cited, so far as they recognize some change in constitutional law as a result of the war, without also recognizing a revolution in the ordinary sense.

But it is absurd, or another of those contradictions which have been so plentiful from the beginning of the Rebellion,[2] to refer to the coercion of war changes in municipal law; for these can be called revolutions, social and economical revolutions, only by a figure of speech. It is a contradiction to call citizens who are opposed to such changes rebels and traitors, and still more to liken them to public enemies vanquished in war.

There may perhaps be a certain inability with some persons to recognize a revolution in any other sense than this, that is, that of a change of municipal law. For according to the common theory of popular sovereignty, the sovereignty of the nation as a mass, it might be argued that such sovereignty exists of necessity, and that, therefore, there never can be a revolution in the sense of a change in the location of sovereignty.

[1] Compare the close of ch. vi., *ante*, pp. 285, 286.

[2] Compare *ante*, p. 90, in the close of ch. ii.

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Mr. Garfield's View of Sovereignty.

As incidental to this conception of revolutions in general, and as showing the fundamental idea in the philosophy of a certain school,[1] a passage may be recited from Mr. Garfield's speech of July 27, 1879.

In continuation of the remarks cited already on page 499, Mr. Garfield said: —

"Mr. Chairman, the dogma of State sovereignty, which has reawakened to such vigorous life in this chamber, has borne such bitter fruits and entailed such suffering upon our people that it deserves more particular notice.

"It should be noticed that the word 'sovereignty' cannot be fitly applied to any government in this country. It is not found in our Constitution. It is a feudal word, born of the despotism of the Middle Ages and was unknown even in 'Imperial Rome.'[2] A sovereign is a person, a prince, who has subjects that owe him allegiance. There is no one paramount sovereign in the United States. There is no person here who holds any title or authority whatever, except the official authority given him by law.[3] Our only sovereign

[1] By *school*, I do not mean a political party. The people of this country, of all political factions, have always hugged to their bosoms these delusions as to the conditions of their political existence. It was for this reason that the opponents of Mr. Garfield in the House were unable to reply effectively to his arguments founded on fallacies which they equally accepted. Among similar denials of the necessity of recognizing a supreme or sovereign authority in some living person or persons, one is found in an Address, July 4, 1831, by J. Q. Adams, to which Story refers with approval, Comm. § 208.

[2] A similar statement had appeared in Mr. Motley's letter to the London Times, 1861 (Rebellion Record, Vol. I. Documents, p. 211), which is one of the most extravagant assertions of the theory of sovereignty held by the people as a mass. The same had been said by Mr. Webster in his speech of Feb. 16, 1833, in reply to Mr. Calhoun. (Webster's Works, iii. 469.) It would be singular if Mr. Garfield or Mr. Webster or Mr. Motley really meant that the relation of sovereign and subject, as between two human beings, was never known before the Middle Ages. The proper distinction is merely that territorial sovereignty — dominion in relation to a certain limited portion of territory — became the foundation of feudalism, in distinction from that *imperium* over natural persons, without reference to territory or residence, which had been the ancient basis of public law, and which was continued by the theory of the middle-age German Empire. This is fully considered in Maine's Ancient Law, pp. 99–104. See also Bryce's Holy Roman Empire, 123.

[3] As the speaker on another occasion (*ante*, p. 502) had maintained that coercion must exist if law is to exist, he must be of that school which im-

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is the whole people. To talk about the 'inherent sovereignty' of a corporation is to talk nonsense; and we ought to reform our habit of speech on that subject."

The fundamental fallacy is here exhibited in comparing political personalities to corporations under municipal law, that is, to artificial persons, such as are made and continue to exist by the legislative will of a visible political superior who is not an artificial person. The historical fact is that the States were not "corporations" in that sense; not artificial persons made and continuing to exist by the legislative will of a political superior, visible or invisible. They came into being, as States, by the transmission of the *imperium* or sovereignty from the crown and Parliament of Great Britain to *them in union;* they, severally, consisting of so many actual human beings — the electors or voters acting through agencies called *governments* and thereby determining, each for itself, its several existence as one of the United States, sovereign in their voluntary union.[1]

They were political personalities which had originated as corporate bodies under special legislative grants, — charters or patents — or permissive sanction, resting on the prerogative of a recognized political sovereign, determining the natural persons who should constitute such corporations. In the Revolution these corporate bodies as political personalities assumed and maintained by force, the force of war, the possession of sovereignty, which in and by that force was transmitted to them, in union, from its former holders.

In the history of this fact the Declaration of Independence is simply a record, — a fragment of the journal of the Con-

agines laws as having coercive force in themselves, — the theory of the "sovereignty of law."

[1] Compare the rejection of this distinction by Professor Jameson, *ante*, p. 127, n.

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gress composed of the delegates of the United Colonies at that moment, the whole being part of a much more expanded historical record. To attribute to it a legislative force, determining the political value of the facts which it records, is absurd.[1] Its distinctive importance in the whole record is in the fact that it has been accepted by all the world as marking an instant of time, — an instant for the transmission of pre-existing sovereignty from one holder to another.

The battles of the Revolution, making possible the establishment of diplomatic relations between an earlier holder of sovereignty in and for the colonies and a new holder of the same sovereignty in and for the States united, were the essential facts which gave all the distinctive importance to this record. What gave meaning to the Declaration was not any motive, principle or theory, expressed or not, but a purpose, — the purpose to take independent political power by force, by right above law, because by force above law. What gave it importance was the fact that this purpose was sustained by force which proved adequate to the occasion.

The question for all the world at that moment was, Who is the political personality (or, who are the political personalities) capable of holding sovereignty as a unit, that is, independent political power sustained by force, — who has (or who have) thus expressed this purpose and actually maintained it?

This Declaration and every other part of the historical

[1] To the disciples of this school, the Declaration becomes another fetish; more powerful, as such, than the Constitution itself. In connection with some sentences already cited from Cooley's Constitutional Limitations (*ante*, p. 125, n.), the author says, "The Declaration of Independence made them sovereign and independent States by altogether abolishing the foreign jurisdiction and substituting a national government of their own creation." See also R. Frothingham's Rise of the Republic, ch. xi., where the document is spoken of as if it worked of itself. Taine has said somewhere, "Under the shell there was an animal, and behind the document there was a man."

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record indicate that the colonies, as thirteen distinct political personalities in union, said, at this time, that they could, in union, become free and independent, and that they meant to be free and independent States in union; and, as soon as the former possessor of sovereignty in and for these colonies, after sufficient trial or test, recognized that this was a fact and not merely a purpose, there was an end of the matter, as far as that former possessor of sovereignty in and for those colonies was concerned.

And this being the fact of the matter, as far as we too are concerned, it is no matter to us what "the people" or "the nation," in the sense of all the inhabitants of all the colonies taken as a mass, thought on the subject. We know perfectly well that, taken as such mass, they did not *do* anything about it.[1] It is a fact, about which nobody has ever disputed in the least, that nobody, individually as a human being, had at that time, or ever since has had, the option to say whether he or she would or would not recognize this as the fact of the matter. Nobody individually has had the option to like it or not to like it. Or, the only option has been to like it, and stay, or not to like it, and quit. To recall this to our minds, the allusions to "the Loyalists" and "the Tories," in Mr. Garfield's speech of Aug. 4, 1876, are sufficient.[2]

It is a fact, about which nobody disputes, that society and government were never, for an instant, broken up or discontinued. It is as certain as anything in history can be that nobody, for an instant, was released from political and civil subjection to political and civil supremacy, or was for a moment in a situation to act like an independent sovereign, or do as he or she pleased without regard to any political authority. The laws which had rested on

[1] *Ante*, p. 112.

[2] How Mr. Garfield would apply in such cases the doctrine of a right of private judgment in matters political, or, indeed, on what authority he attributed that doctrine to Luther (*ante*, p. 467), he has not shown.

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the authority of the colonies, maintained by their political relation to the crown and parliament of Great Britain, continued to rest on the authority of the States, maintained by their mutual political relation (as corporations, if anybody chooses to call them such) in their voluntary union, together possessing sovereignty as a unit. It is as certain as anything can be certain from history that the people or nation, as a mass, did not do anything to make this state of things or to unmake it.[1] Each State, being in union with the others, determined its own corporate existence, determined the natural persons who, having been the constituent members of the colony, should continue as the electors or voters of the State in its use or exercise of the power of sovereignty in union with the other States.

It is certain that nobody participated in political life as a voter for representative government except as his capacity was derived from the will of the pre-existing and continuing corporate body called "colony" and afterwards "State."

There was, therefore, nobody in existence who actually

[1] As these pages are written Mr. Jefferson Davis's "Rise and Fall of the Confederate Government" appears (June, 1881), which I here notice as containing an exposition of the historical weakness of the theory of sovereignty in the people as a mass, as it had been presented by Story, Webster, Everett, Motley, and others. (See Part II., *The Constitution*, Chapters IV.–IX.) But yet Mr. Davis, like all of the school he opposes, repeatedly asserts the inherent sovereignty of the individual, that governments rest on the consent of the governed, using *government* in the same ambiguous way (Vol. I. p. 299, 452), and the possession of sovereignty by aggregate masses of people (Vol. I. pp. 142, 154, 155), as political axioms. One of his most deliberate propositions, however, is (Vol. I. p. 157): "That political sovereignty resides neither in individual citizens nor in unorganized masses, nor in fractional subdivisions of a community, but in the people of an organized political body." Another work which appears simultaneously, and which contains a still more elaborate refutation of the historical basis for the so-called "National" theory, and which is characterized by the same mistaken notions about *sovereignty*, etc., is "The Republic of Republics; or, American Federal Liberty," by P. C. Centz [pseudonym], Barrister. Fourth edition.

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held and exercised political power by right above law but these corporate bodies, and, therefore, nobody who did or could give or make State and national constitutions, but these States.[1]

Outside observers might think that the fact of the secession war had proved sufficiently that our written Constitution cannot of itself determine for the individual citizen who those shall be who will protect his life and property, and who can also compel his obedience for protecting the lives and property of others.

It will be said, however, by those who would make deities out of constitutions, that the possibility of perjury and falsehood must be necessarily recognized; that if everybody would "continue to execute all the express provisions of our national constitution, the Union would endure forever, it being impossible to destroy it, except by some action not provided for in the instrument itself."[2]

But there is something else, lying behind the Constitution, which has to be settled before any conclusion as to perjury in breaking one's oath to support it, or as to crime in not obeying it as law can be reached.

To show this I do not propose to appeal to the arguments of any secessionists or of any Southern statesmen.

On more than one occasion during his distinguished career in Congress the present occupant of the presidential chair has given a view of this matter which, if accepted in his justification, must be equally serviceable for every other American citizen.

In the course of debate on the confiscation legislation,

1 Compare on these facts, *ante*, ch. iv. Those who attribute to "ideas" the force of law derived from a political sovereign (compare *ante*, p. 456), would probably claim the German author, Herder, as a leader, but even he said: "The historian will never attempt to explain a thing which *is* by a thing which *is not*. And with this severe principle all ideals, all phantasmas of a dream-world disappear." K. Hillebrand's Lectures on German Thought, p. 182.

2 See Mr. Lincoln's language in his Inaugural, *ante*, p. 144, n.

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arising at the first session of the Thirty-eighth Congress,[1] Mr. S. S. Cox, also a representative from Ohio, had asked whether "he [Mr. Garfield] would, to aggravate the punishment of the traitor or to punish the innocent children of the rebels, break the Constitution?"

Mr. Garfield replied, —

"I would not break the Constitution for any such purpose. . . . I would not break the Constitution at all, unless it should become necessary to overleap its barriers to save the Government and the Union."

In the course of a debate which arose a few months later, and which will be noticed again hereafter,[2] these remarks were recalled to Mr. Garfield's notice, and on that occasion he repeated the statement of his position.

But, as being similar as an illustration of the point taken, I next refer to a well known paper written in the interval; one which has for many persons, probably, an authority greater than they would accord to anything written by anybody now living.

In the letter to Colonel Hodges, already mentioned, dated Washington, April 4, 1864, Mr. Lincoln wrote: —

[1] Jan. 14, 1864, 1st Sess. 38th Cong. Globe, 213; in a debate on a joint resolution explanatory of an "Act to suppress insurrection, punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." See *ante*, pp. 59, 170. Speaking on the same matter, Jan. 28, 1864 (Globe, 403), Mr. Garfield said that he could not agree either with the theory which "acknowledges that these States are out of the Union [which he attributed to Mr. Thaddeus Stevens], nor, on the other hand, agree with those who believe that the insurgent States are not only in the Union, but have lost none of their rights under the Constitution and laws of the Union." Mr. Garfield, with the majority of his fellow-statesmen, must however have sustained this legislation on a combination of two incompatible positions, one resting on the theory of an international war, and the other on the theory of municipal law against rebellion. Comp. *ante*, pp. 170–179. On the same occasion, when discovering a precedent for this legislation in the several action of *the States* at the close of the Revolution, confiscating the property of the adherents to the crown, Mr. Garfield attributed it to the exercise of a war power. For this position he cited the authority of Jefferson, when Secretary of State in 1792. Globe, 404.

[2] See *post*, p. 515.

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Mr. Lincoln's Letter to Colonel Hodges.

"You ask me to put in writing the substance of what I verbally said the other day in your presence to Governor Bramlette and Senator Dixon. It was about as follows: 'I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I cannot remember when I did not so think and feel, and yet I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling. It was in the oath I took that I would to the best of my ability preserve, protect, and defend the Constitution of the United States. I could not take the office without taking the oath. Nor was it in my view that I might take the oath to get power, and break the oath in using the power. I understand, too, that in ordinary and civil administration this oath even forbids me to practically indulge my primary abstract judgment on the moral question of slavery. I had publicly declared this at many times and in many ways. And I aver that, to this day, I have done no official act in mere deference to my abstract judgment and feeling on slavery. I did understand, however, that my oath to preserve the Constitution to the best of my ability imposed upon me the duty of preserving, by every indispensable means, that Government — that nation — of which the Constitution was the organic law. Was it possible to lose the nation, and yet preserve the Constitution? By general law, life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assumed this ground; and now avow it. I could not feel that to the best of my ability I had even tried to preserve the Constitution, if to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together. . . . I add a word which was not in the verbal conversation." [1]

[1] The remainder of this letter has already been quoted, *ante*, p. 470. If Mr. Lincoln was right in calling the secession ordinances nullities, and void, as acts, because there was nothing in the Constitution to authorize them (*ante*, p. 144, n.), this letter is an argument for the nullity of his own edict. Such claims as this of Mr. Lincoln are one of the marks of civil war in republican states. While the issue was still pending between the second triumvirate and the party of Brutus and Cassius, Cicero wrote to Brutus, "By what right, by what law, shall Cassius go to Syria [as proconsul]? By that

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Mr. Garfield on breaking the Constitution.

In the course of the debate already noticed, on the motion for the expulsion of Mr. Long, that gentleman had alluded to the remarks of Mr. Garfield on the 14th of January, as above cited. Mr. Garfield said in reply: —

"I said what I did say upon that occasion with great circumspection and care, and all I ask is that the gentleman will fairly quote me, as I presume he intended to do. In reply to the gentleman from the central district of Ohio [Mr. S. S. Cox], who is not now in his seat, when he asked me if I would break the Constitution, I answered that I would not break the Constitution at all, unless it should become necessary to overleap its barriers to save the Union. I did not say then, as I do say now, that on such an occasion I would overleap the barriers of the Constitution, but I would leap into the arms of a willing people who made the Constitution."

On the same occasion, immediately after the remarks already cited, as to a right of revolution and his determined purpose to resist it by force (*ante*, p. 499), Mr. Garfield said: —

"What is the Constitution that these gentlemen are perpetually flinging in our faces whenever we desire to strike hard blows against the Rebellion? It is the product of the American people. They made it, and the creator is mightier than the creature. The power which made the Constitution can also make other instruments to do its great work in the day of its dire necessity."

The question being asked by another member whether he had not, in the same remarks, alluded to his having, together with the other representatives from the State of Ohio, taken at the Speaker's desk the oath to support the Constitution, Mr. Garfield answered: —

"I did; and I am very happy the gentleman has reminded me of it at this time; and I remember in the very preamble of that Constitution it is declared to be ordained and established for the purpose of promoting the general welfare and providing for the common defence; and on that very ground, based on that very state-

law which Jupiter sanctioned when he ordained that all things good for the Republic should be just and legal." Trollope's Life of Cicero, II. 218.

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ment of its declared object, I not only lifted up my hand to swear to support the Constitution before God, but it makes me now sorry there had not been a sword in it when I lifted it up, to strike down any and all who would oppose the use of all the means God has placed in our power for overthrowing the Rebellion forever." [1]

In reply to a question from Mr. S. S. Cox, also a representative from Ohio, Mr. Garfield said during the same debate: [2] —

"What I have uttered is this: When asked if I would under any circumstances override the Constitution, I said this and this only, — premising, as I believed, that the Constitution was ample enough of itself to put down this Rebellion, that its powers were most capacious, and that there was no need to override it, — that if such a time ever should come that the powers of the Constitution were not sufficient to sustain the Union, if that impossible supposition should ever prove true [*laughter from the Democratic side of the House*], then I would say that we have a right to do our solemn duty under God to go beyond the Constitution to save the authors of the Constitution." [3]

Some will say, probably, that such declarations show at least that there must be some very material limitation to that veneration for the Constitution which outside observers have supposed to be so universal in our minds.[4] More critically considered, however, such language may rather be taken as betraying one of those phases which all fetish worship exhibits. While all goes well with the devotee he exalts his idol with song and sacrifice, and boasts its omnipotence as he invokes its terrors against rivals and enemies crouching about some other jungle-shrine. But if fortune is adverse, and his lusts fail of gratification, the idolator begins sulking before the senseless block, refuses

[1] Could Mr. Garfield possibly mean that he would have felt justified in taking, on his individual judgment and responsibility, the life of any or all who would oppose him in any assumption of power he might think proper for this purpose?

[2] 1st Sess. 38th Cong. Globe, 1505.

[3] On the same question compare *ante*, pp. 346, 347, and the notes.

[4] *Ante*, p. 98.

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incense and homage, rails at its obstinacy, and, as things grow worse, strips it of its ornaments, and even gives Mumbo-jumbo a douse in the horse-pond. The fetish, however, is none the worse for this usage. When the day of adversity is passed, the deity becomes respectable again to the enslaved imagination of the votary; and when he has seen his desire satisfied on his enemies, he brushes up his soiled faith, renews his broken vows, and sets his god up again, with fresh paint and brighter feathers, — a somewhat changed but no less powerful divinity, to answer the needs of the superstition that gave it being.

All citizens must be alike in respect to the obligation to obey the Constitution, whether they may have taken an oath to that effect on assuming the responsibilities of an office, or not. The question might be asked, how any member of the general Government, or any other citizen, is to know that those from whose will the Constitution derives its authority did not intend that their will should be maintained only in the way therein indicated. This, indeed, has always been assumed as the great end, purpose, and advantage of written constitutions, — that they limit even the ultimate sovereign. Whether this is not the fundamental fallacy and weakness of all constitutional governments is a question which need not be here examined. That Mr. Garfield on this occasion saw this obvious objection to his position appears from his evading it by assuming that, in indicating the general welfare and the common defence as the ultimate objects of its provisions, those from whose political existence the Constitution derived its authority had entrusted to him the care of that existence, independently of any written Constitution whatever.

Considering that for several generations the people of this country having been trying to persuade themselves that the written Constitution of the United States must be all-powerful for the conservation of everything else, it

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would not be strange if some who read these candid statements find it difficult to understand why this Constitution cannot be trusted to take care of itself as well.[1]

But Mr. Lincoln and Mr. Garfield were correct in this at least, if they meant to say that there is no constitution to be faithful to, at any time, unless there is somebody in existence at the same time to whom its authority can be ascribed; and their argument, if it may be called such, may be construed as being that they regarded their oaths to support the Constitution, as law, equivalent to oaths of allegiance to some sovereign existing independently of the Constitution.

This being recognized as the true view, it remained to determine who the person or persons were to whom allegiance was due; which is no other question than the question, Who are the person or persons from whose will the written Constitution is law for anybody?

The question turns upon the existence of a fact necessarily preceding the Constitution in the order of cause and effect. Here, therefore, no courts, no learned jurists, no arguments from the lawyer's point of view, can decide the duty of the individual citizen. It is a question of fact, to be determined for himself by the intellect, conscience, and bodily senses of each natural person on the testimony given in history, continuing to the moment of the question. And responsibility for the answer will rest on each such person individually.[2]

[1] The difficulty in the case is that it can do so only "as far as its nature will permit," to use Marshall's words, *ante*, p. 430.

[2] Paper No. 83 of the Loyal Publication Society [1865] was one by Dr. Lieber, proposing certain amendments to the Constitution, the first of which was to read: "Every native of this country, except the sons of aliens whom the law may exempt, and Indians not taxed, and every naturalized citizen, owes plenary allegiance to the government of the United States, and is entitled to, and shall receive, its full protection at home and abroad." Lieber's Miscell. II. p. 177. If adopted in the ordinary manner of an amendment, this provision could not have had the proposed effect. For, if law, like the

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Position of an Officer of the Government.

Mr. Lincoln and Mr. Garfield, the one being the President, and the other a member of the legislature, each measured his capacity as an officer of a government established under a written Constitution by his own unsupported decision of this question, as presented to each citizen of the United States. In the position which they took at this crisis, the Constitution could be no guide to their duty as members of the Government. It could merely be to them, as to any other citizen, part of the evidence leading their minds to a knowledge of those who were the creators of the Constitution.

It is plain, therefore, that a member of the Government who takes such a position must take it in view of his individual duty, as a citizen, towards some political superior. But it is equally clear that everybody else is in the same situation in regard to this question, — whether to observe the Constitution or not to observe it, — and must likewise rest his political obligation on his own unsupported knowledge of the fact which is the cause of the Constitution as effect.[1] It must, in the last resort, be a question of conscience for each person obliged to recognize a sovereign, somewhere, before he can recognize a constitution as law.

It will be seen, then, that, logically, President Lincoln and Mr. Garfield were in no better position on this point than any States-right theorist or practical secessionist. This was precisely the position taken by the citizens of the eleven States of the Confederacy. They also recog-

rest of the Constitution, the provision itself must be referred to the continuing will of somebody, and, whoever that was, to him or them the allegiance would be due. This proposition was an illustration of Dr. Lieber's theories about the source of law or of the relation of law to "sovereignty," a term which in conversation he often said "we must get rid of."

[1] The difference in the positions of the member of a government and the private citizen is in the opportunity which the former may have "to force the hand" of those who have entrusted him with constitutional power. It was from this opportunity that Mr. Lincoln's Emancipation Proclamation had its so-called validity.

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nized the existence of the authors or creators of the Constitution as superior to the existence of the Constitution as law. But the testimony given by history, as it was apprehended by their intellects, consciences, and bodily senses, told them that the Constitution derived its authority at that time from the will of States severally and individually sovereign.

When the issue is presented in this form, all that those who would support the general Government, on Mr. Lincoln's and Mr. Garfield's theory of political duty, can say is, that they intend to act as though any who differ from them as to the facts were mistaken as to the facts.

If they succeed in that course of action, that settles the question of fact for themselves and for everybody else. For the question is one which is never settled as matter of prevailing opinion only; that is, not by the mere opinion of even the greatest number.

The citizen must be individually responsible for his own decision as to his political duty; but an opinion on the question of fact, whether held by one or by many, counts for nothing, as far as one's self or others are concerned, except as it is supported by some actual or prospective exertion of force.

Those who claim the capacity to determine, for themselves and for everybody else, the personality by whose will the Constitution became and continues to be law must, in reality, claim to be themselves that personality, or to be themselves the makers of the Constitution. To decide, for others, who is their political superior is to be that political superior. Anybody, who likes to try, may take this position; but to make it of the slightest importance to anybody else, he or they who take it must be able and ready to maintain that view of the facts by main strength. In point of fact, those who have actually done this, that is, who have taken this position and maintained it by force

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from the first day of national independence to the present moment, have been the political peoples of the States which have continued in a voluntary union. And this is the evidence, and the only evidence possible, that they, the States in union, are those from whom the Constitution derives its authority.

Instead of recognizing some actual person or persons as actually holding sovereign power, Mr. Lincoln and Mr. Garfield in these instances, as all of that school which attributes sovereignty to the nation as a mass have done, placed their own private standard of right and wrong, of public and private advantage or disadvantage, in the place of the will of a sovereign. This was indeed the characteristic method of Story, Lieber, and many others who have had a leading part in educating their generation in political life.[1]

But in this respect, these American publicists are not distinguished from many others who in other countries have lived contemporaneously. They were, in many respects, in harmony with a class of political reformers in Europe, who are contending against what they call "property in power," whether held by a few or by many, and who are trying to convince the world of the possibility of "the sovereignty of law,"[2] of the possibility of societies governed by justice, without recognizing anybody who shall determine what is just: though all of this school

[1] In a notice of Dr. Lieber's Miscellanies, in the Nation, March 27, 1881, it was remarked: "Dr. Lieber never seems to have fully comprehended the distinction, now so fully recognized by all English publicists, between the domain of law, embracing the legal conception of rights, duties, and the attendant sanctions, and that of ethics. This fault, so noticeable now, wholly escaped the observation of his own generation, because it was shared by almost all the leading writers of the day. Kent, Story, and all their contemporaries had very antique and confused conceptions as to the relation between law and morals." Compare, on the other hand, authors such as Austin, Maine, Bagehot, and Stephen.

[2] *Ante*, p. 96.

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propose that everything they may personally consider right shall be taken for justice.

It seems to be assumed, at the present time, by many, that all political and social evils would necessarily be less if the power to remedy them were entrusted to a general, central, or national government, — employing the States, if allowed to subsist, as agencies perhaps — than if the requisite power should be continued, as far as it has been "reserved," in the hands of the States. The doctrine may be true enough, as political philosophy;[1] but, even if it is, the question whether the power is so located is not determined by such a principle, and nobody has a right to act as if it were so determined. It is certain that no such principle was accepted by our predecessors of a century ago. Whatever the actual seat of sovereignty, as a unit, may have been, it is certain that all the public law proceeding from that sovereignty has been founded on the expediency of distributed powers.[2]

There is no necessity, however, that we who live to-day should agree with our predecessors on this or any other point of political expediency.[3] Whatever the location of sovereignty as a unit may have been before the war, it is conceivable that; now at least, it should be no longer held by the political peoples of the States united. And if this is the case, there is nobody else to hold it but the person or persons known for the time being as constituting a National Government: because the possession of sover-

[1] It is open to foreign observers, who believe in this as a principle, to criticize our form of government for not recognizing it, as does Mr. Bagehot (English Constitution, 282). But it is very singular that a writer like Bagehot, as soon as he looks at our political structure, argues about it as if the possession of ultimate power could, with us, be determined by law, or was not a question of fact upon which all law must depend. See ib. pp. 281–289.

[2] For this position, Lieber and De Tocqueville, among many, may be cited as leading authorities.

[3] *Ante*, p. 319.

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eignty by the people as a mass is nothing but an hypothesis, and has no political consequences whatever, except as some person or persons may succeed in using sovereign power in the name of such people.[1]

If we are now to conceive this doctrine or theory of our national existence as established by the military success of the Government in the war which closed in 1865, it is immaterial to the question of present obligation whether it is or is not to be recognized in history as a revolutionary change.

On the dedication of the cemetery at Gettysburg, Mr. Lincoln's simple and pathetic eloquence declared, —

"The world will little note, nor long remember, what we say here, but it can never forget what they did here. It is for us, the living, rather to be dedicated here to the unfinished work that they have thus far so nobly carried on. It is rather for us to be here dedicated to the great task remaining before us — that from these honored dead we take increased devotion to the cause for which they here gave the last full measure of devotion — that we here highly resolve that the dead shall not have died in vain; that the nation shall, under God, have a new birth of freedom, and that the government of the people, by the people, and for the people, shall not perish from the earth."

From the antecedents, as well as from the language, of the speaker on this occasion, it is known that he regarded the object of that sacrifice of life as a noble, just, and righteous one, and it must be assumed that, whether it came by the path of revolution, or by that of fidelity to a pre-existing sovereign, he was ready to accept some "government," or possession of sovereignty, as a fact established at the cost of those labors and lives which had thus consecrated the scene of their last effort.

The question then remains awaiting an answer, What is this "government of the people, by the people, and

[1] *Ante*, p. 333.

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for the people"? And this is still the same question it was before, — the question of the definition of the words, "the people of the United States."

It was said in the last presidential Inaugural that "unsettled questions have no pity for the repose of nations," [1] and no truer words, or words more worthy of their consideration, could be addressed to the American people. It is evident that there will always be unsettled questions in the daily life of any nation; and more of such may be expected in new, growing, or developing countries, and in the present era of invention, progress, and free inquiry. As to questions in respect to ordinary domestic and foreign policy and legislation, if they are for a time unsettled, it is at least settled who the person is, or who the persons are, who can settle them. But there is a class of questions as to this very point; or, rather, there is this question of questions, — Who is it that can settle unsettled questions? and wherever there is a nation for whom this question is unsettled the prospect of repose is very limited. *Miserum est servitus ubi jus vagum et incertum est*, and the *jus* is always uncertain where the power to declare what shall be obeyed as law is uncertain.

The desire for political power, as incidental to all human nature,[2] must be expected to operate in this country, as elsewhere, whatever may be the theory hereafter accepted, — whether that of a supreme government, assuming to represent the nation as a mass, or, on the other hand, that of some federal union of sovereign States. It must be anticipated that political parties will exist, in either case, as

[1] March 4, 1881. The President used the expression in the following connection: "If in other lands it be high treason to compass the death of the king, it should be counted no less a crime here to strangle our sovereign power, and stifle its voice. It has been said that unsettled questions have no pity for the repose of nations. It should be said, with the utmost emphasis, that this question of the suffrage will never give repose or safety to the States of the nation until each, within its own jurisdiction, makes and keeps the ballot free and pure by the strong sanctions of the law."

[2] *Ante*, p. 307.

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they exist at the present day in all civilized countries, and especially in those having a more or less democratic form of government.

But the contest between the *Ins* and the *Outs* for the control of the administration of a government is one which may, and ordinarily does, go on continuously with very little attention from the great majority of citizens. As long as there are no difficulties in the conception of any as to the personality who is the actual sovereign, the individual citizen can regard himself as true to all political obligation, whatever party may control the administration. However eager such parties may be in the pursuit of official power, and however important the moral and material tendencies of their respective policies may be, there is a sense in which it may be said that the repose of the nation or state is undisturbed.

For the rivalry of such political parties does not necessarily involve questions as to the ultimate seat of supreme power, the *forma imperii*, — the possession of government in that sense, — the possession of power above law. Political parties are supposed to contend for the control of *government* in the lower and more ordinary sense of the *forma regiminis*, — the administration of government in its several functions, — the possession of power under law.[1] In such party contests there is no question of allegiance to a sovereign. But if a political party aims at effecting a change in the actual seat of power, — of power above law, — it acquires a revolutionary character entirely distinct from that of ordinary political parties, and in the proportion that the possession of ultimate political power is involved in the strife of contending factions it acquires the character of civil war.[2]

[1] *Ante*, p. 302.

[2] In some countries, though having a republican or constitutional form of government, the party actually holding the administration may claim

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Relation of the Slavery Question.

Whatever may be the moral responsibility of individual citizens attending either of such conditions of political strife, it is plain that they cannot, if they would, occupy the same position of indifference in reference to parties of the latter description which they might in respect to normal party contests for administrative power. For as soon as the question of allegiance is involved in the success of one or the other party, even non-resistance, as towards one side, becomes criminal, as towards the other.[1] In the case, then, of such unsettled questions there is no repose for the nation or for the citizens; because there is no certainty either as to the duty to be rendered on the one hand, or the protection to be received on the other.

The question of the actual location of sovereignty in the hands of some particular persons, as distinguished from some others, being purely a question of fact, has no necessary connection with problems of political economy, nor with any moral or religious considerations as to the right or wrong of any particular social institutions. But as slavery had always been an institution resting on State laws, and as the doctrine of State-sovereignty and allegiance to the State had been employed to justify secession in the defence of slave-holding interests, many persons seem to have persuaded themselves that there was an intrinsic connection between the political doctrine and the domestic institution.[2] At least, they have argued as if the question of political obligation, as between the general

that it alone represents the actual sovereign. This has been so often illustrated in the civil dissensions of some Spanish American republics that it has acquired, with us, a distinct name, — the Mexicanization of institutions. In such countries all party contests have the character of civil wars. The same thing would occur in this country, if a party, on the theory of a "war of ideas," should attempt to retain the control of the general Government against the popular vote. Compare *ante*, p. 472, note.

[1] Compare *ante*, pp. 98, 503.

[2] Compare the extract from Mr. Garfield's speech, Aug. 4, 1876, *ante*, p. 467.

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Government and the State, could not have presented itself to the mind of the citizen, except in connection with the question whether the slavery, or, more generally, the social and political inferiority, of descendants of African negroes should be approved by his individual conscience.[1]

Having accustomed themselves to regard the powers of the general Government as the proper instrument for sustaining their personal views on this question, many persons seem to assume that a centralized government would necessarily promote any moral or economical objects which they may individually approve, and they now congratulate themselves and their fellow-citizens upon an approaching era of peace and virtuous prosperity under the sway of the prevailing opinion of the hour, which they take for granted will always be identified with their own.[2]

But this view eliminates, not only the original principle in favor of a distribution of the powers of sovereignty, but even all idea of political obligation. It assigns to the moral judgment of the individual citizen the place which can only be occupied by a historical fact, — the fact that some person or persons must be recognized as possessing the supreme power, and as claiming the allegiance and obedience of the citizen, before right or wrong, in their legal sense, can exist.

[1] For the contradiction of this view given by the history of slavery, compare *ante*, p. 376, note.

[2] This way of looking at the whole subject as an issue depending on the moral feeling of the individual citizen has not been limited to any one class of persons. Compare *ante*, p. 492, note, a quotation from one of Mr. Garfield's speeches. But from the antecedents of those who have most conspicuously illustrated it, it might be called the clergyman's point of view; which, on such a question, is even more inadequate than the lawyer's. (*Ante*, p. 443.) It is evident that the same sort of reasoning might at any time be used as effectually to support State sovereignty, to say nothing of slavery, as it has been by persons at the South, of the like clerical antecedents. This view is closely connected with that confusion of law with ethics which characterized so many jurists of the last generation. Compare *ante*, p. 521.

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Necessity of the Question.

It was the doubt, uncertainty or, rather, the absolute ignorance of the people of this country on this question of political fact which alone made the civil war possible. Had there been a universal recognition of some sovereign to whom allegiance had been due up to that moment, either secession would have been accepted, as matter of political faculty on the State sovereignty theory, to be followed by international relations, peaceful or warlike, or it could, on some opposite theory, have been attempted only as simple revolution, and been recognized as such. If it had taken this form in the minds of the Southern people, that is, if they had attempted it without a sense of support in the doctrine of State sovereignty, the knowledge of this on the part of the rest of the country, and its recognition of the movement as revolution pure and simple, would have given a different character to the conduct of the war. It would have excluded entirely that idea of international war, — the idea of war between the States as such, — which, at the beginning, palsied the energies of the general Government, and invited foreign sympathy with the Southern cause, and which was at the first, and has ever since been, a source of division, bitterness, and partisan bickerings at the North.

If there is such a thing as a natural right of a natural person in civil society, it must be the right to know who those are who, as sovereigns, actually hold power, for the use of which they are responsible only to God and their own consciences, and who can determine on the lives, liberty, and property of others, — being answerable to none other, unless by the appeal to arms.

The question considered in this essay is, then, one about which every human being standing on the soil known in geographies as the United States of America, or even hearing the name pronounced in any part of the world, may claim a right to inquire.

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It is also to be remembered that this inquiry is far less important as a right than it is as a necessity. It is, indeed, a right because it may at any moment become a necessity. Yet, however obvious the right may be, or however important to the citizen may be the consequences of not arriving at the true answer, it is possible that he may sometimes be unable to find an answer, because at a loss as to whom he shall inquire of.

A doctrine of State-sovereignty, from which the capacity of a State to secede was logically deducible as a political right independent of law or written constitution, had been asserted, from the earliest period of our political existence, by a large number of persons eminent for learning, private worth, and public services. They derived that doctrine from a view of history, preceding the adoption of the Constitution,[1] which had been generally accepted in all parts of the country until a time within the memory of persons still in active life, and the doctrine itself was one which was also in harmony with statements of elementary political principles, which, if false, as they have herein been held to be, have from the period of the Revolution of 1776 to the present moment had almost universal currency with the various political schools known in this country.

But, since 1861, a new history has been put on record, which requires some theory of our national existence, or of the location of sovereignty, to be found which shall not only be a consistent denial of all theories supporting a right of secession, but which shall be in harmony with the political action of the Government, as recorded in that history; even if such a theory leads to the denial of all the elementary principles hitherto accepted.

It has been the object of this essay to show that one of two conclusions only, as to our national existence, or the

[1] *Ante*, pp. 99, 100.

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location of sovereignty, can be reconciled with this new history, namely, either —

That of the supremacy, in union, of the States voluntarily remaining united (including the doctrine of possible State-lapse), of which States in union the government organized under the Constitution is only the agent; or —

That of the supremacy of a number of persons composing a "National" government, to whom the States are subordinate, and on whom they constantly depend for the continued exercise of the powers "reserved" to them, as expressed in the language of the Constitution.

Whether either one of these conclusions involves the supposition of a successful usurpation, or of a revolution, is not material to the validity of the above alternative; because, in any event, the political occurrences of the last twenty years are to be accepted on some theory, — on the theory of a usurpation or a revolution, if none other can be found.[1]

But if we are to judge from that utter failure of all the "overwhelming argument" produced before 1861, — a failure which the "wager of battle" proved, if it proved nothing else,[2] — it is doubtful whether the mass of citizens will be able to study out, each for himself, any similar question of political duty, if such should hereafter arise as between persons composing a National Government, claiming sovereignty in the name of the people as a mass, and the States, — the organized political peoples of the States, as sovereign in union.

The individual natural person known either as citizen or as subject must decide the question for himself and take on himself personally the responsibility for his decision. That is to say, there is no one but the supreme power-holder who can decide for the individual citizen or subject who that supreme power-holder is. It is always, in the

[1] Compare *ante*, pp. 107, 333, 347.

[2] *Ante*, p. 89, note 2.

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last resort, a question of force as distinguished from a question of law; it is a question of the place of that force which is the source of law, — the sovereign power of law-giving;[1] and the question the individual asks of himself and of everybody else is, Who is the person, or who are the persons, who will compel my obedience?[2]

But it is the essence of republics that they are states in which the *forma regiminis*, or government in the lower sense, is distinguishable from the *forma imperii*, or government in the higher sense.[3] And in such states the citizen or subject, when called upon to recognize the supreme source of law, even to the extent of exposing his life for its defence, looks to those who have assumed the duties of the *forma regiminis*, the government in its lower sense, to point out to him who he is or who they are whom they regard as that supreme source of law, when they assume the right to administer any law at all.

I have in another place noticed Judge Joel Parker's animadversions on a lecture by Judge Emory Washburn before the Harvard Law School in 1864, which the former criticized as teaching the duty of the legal profession to construe and interpret the Constitution thereafter in such a way as to effect a reorganization of the general Government, while still regarding it as a government under a a written constitution as law.[4]

But perhaps Judge Washburn meant only to indicate as a fact, or as an unavoidable circumstance incident to the then recent occurrences, the fact which I here wish to point out, — that the legal profession in general, and more particularly the judiciary in all parts of the country, must be expected to understand for themselves, and be ready and willing to explain to others, upon what theory of the possession of supreme power the action of the gen-

[1] *Ante*, p. 97.
[2] *Ante*, p. 98.
[3] *Ante*, p. 302.
[4] *Ante*, p. 360.

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eral Government during and since the war is to be justified, and whether justified upon the supposition of a revolution having occurred since 1861, or upon some other view of history.[1]

The great majority of persons in this country, as in in every part of the world, desire first of all to live each under his own vine and fig-tree, with none to molest him or make him afraid; and each person of average intelligence knows that for this end there must be some holder of supreme political power, to give him protection. The mass of men may all want liberty above all things; but they also know, practically, that whatever it may be that they call liberty, it must include protection if the liberty is something which all can enjoy. They know that liberty for one means law for others, and, if they did not know it before, an experience of war, and especially of civil war, tells them that law means power, and that power means somebody holding power.

In short, with all their love for liberty for themselves, men want to know who it is whom they must obey, and who it is for whom they may be required to risk their lives in battle in order to render that liberty secure under his protection.

But the history of this country, just as much as the history of the rest of the world, shows that unless men can recognize some such supreme power-holder in existence, whose ability to secure to them liberty and protection is brought to trial, they do not gather together for fields of mutual slaughter.

[1] The vocation of the legal profession is to show the connection between some rule of action and the will of the political superior. But the difficulty with these two learned jurists and others has been that they did not see that, though lawyers must profess to know who that political superior is, his existence cannot be determined from the lawyer's point of view; that is, as a question under law. *Ante*, pp. 98, 109.

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The Question of Fact presented.

In point of fact, people in general do not take up arms to carry out abstract ideas about anything, not even about government or about the possession of sovereignty. The greater number in every country cannot have either the leisure or the learning to study abstract politics, even if they had the inclination; nor do they regard any abstract political principles so important that anybody should be expected to lay down life for them.

Whatever may be the meaning of the words "the government of the people, for the people, and by the people," the fact is that there is no country in the world where any considerable number of persons have proposed to lay down their lives, or see the lives of their husbands, brothers, or sons laid down, that it "might not perish from the earth."

The battle of Gettysburg was not fought for any such vague "idea." Those whose blood consecrated the victory on that field fell to support the authority of some visible possessor of sovereign power, who asked the sacrifice in the name of such authority.

It has not been within the scope of this essay to ask whether the written Constitution of the United States is or is not a masterpiece of legislative institution of government; nor have I proposed either to advocate or oppose any actual or possible investiture of sovereign power, as being, or as not being, desirable in view of the moral or the material interests of the inhabitants of this country. I have not even concerned myself with history, except as that may indicate a now-existing fact; and the only thing considered herein as the ultimate object of the investigation has been, What is the fact, the now-existing fact, about this matter?

It is possible enough that the United States, such as I have supposed them to have been before 1861, or whatever they were when they came into being in 1776, have had their day, and are things of the past, to be known here-

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after only as consigned to the limbo[1] of political vanity, and that they have been succeeded by something entirely different, though still, unfortunately, bearing the same name, which some had long thought a blunder,[2] and which now must be regarded as a bore and a nuisance. For my own part, I am ready to recognize any fact in the world, as a fact. If the fact is that A., B., or C. is the actual supreme power-holder in this country, I am eager to know and accept the fact; and in such a matter to know and to accept are one and the same thing.[3] It may be that the only persons to whom allegiance is now due or will be due are the gentlemen — or hereafter, perhaps, the ladies and gentlemen — who shall occupy the executive, legislative, and judicial departments of the government now located at Washington. Or, it may be, as seems far the most likely, that the legislative branch of the Goverment is the approaching sovereign. As soon as that may be the established fact, I shall be as ready as any one to cry "Long live King Congress!" till King Cromwell come.

As long as the question of the actual seat of supreme power — the power from which the Constitution derives

[1] . . "but store hereafter from the earth
Up hither like aerial vapors flew
Of all things transitory and vain, when sin
With vanity had filled the works of men,
Both all vain things, and all who in vain things
Built their fond hopes of glory or lasting fame,
Or happiness, in this or in the other life,
. . . . . all these upwhirl'd aloft
Fly . . . . . far off
Into a limbo large and broad, since called
The paradise of fools, to few unknown
Long after."— PARADISE LOST, b. iii., verses 445, 493.

[2] Compare Dr. Woolsey's language, *ante*, p. 120. "The name 'United States of America' is an unfortunate one, and has doubtless led many minds into error." Mr. W. W. Story's letters to the London Daily News, 1862; pamphlet "The American Question," p. 48.

[3] Compare *ante*, p. 355.

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its authority as law — is an open one, it will be for the American citizen to consider whether those who demand his co-operation to sustain their measures of government are parties acting in the legitimate sphere of parties under a constitution as law, or are, in reality, contending in behalf of some claimant of supreme power above the Constitution.

The question which has in this essay been presented as the essential subject of interest may be novel to our inexperience and unwelcome to our national self-complacency; but the difficulty of finding an answer to a question of that sort is no novelty in the history of the world, and the consequences of not finding for it a ready answer are not merely those which have left their record on many a blood-stained field of battle.

Whatever may be the moral, economical, and social isues which hereafter shall be regarded as "settled by the war" they have had a sectional aspect, apart from any connection with conflicting political theories. This was caused by differences in conditions of soil and climate, which associated the Southern States in their industrial interests and social constitution, and consequently united them in their continued support of negro slavery, though it was always dependent on the legislative will of each State severally.

It was due to this sectional character of the moral, economical, and social issues that the accidental occasion of the war — the *causa causans*, the slavery question — has concealed almost entirely the *causa sine qua non*, the doubt as to the political duty of the citizen.[1] It was this which caused it to appear, so far as it has been allowed to appear, as an essentially sectional issue, or one which could, by itself, divide the country into two sections, each com-

[1] *Ante*, p. 107.

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posed of contiguous States, necessarily agreeing in opinion upon that political question.[1]

It seems very improbable that the States should ever again, in consequence of any geographical conditions, be discriminated into sections so antagonistic in interests and, as a consequence, so opposed on a question of moral feeling.

But the question of political allegiance can hardly be imagined as a sectional one, unless in connection with some issue equally dependent on geographical and material conditions. So it may be expected, now that the immediate occasion of the war, the slavery question, is removed,[2] that the question, To whom is allegiance due by each natural person? should receive a clearer recognition as one essentially distinct from all sectional differences.

It was due to the sectional character of the Rebellion [3] that the soverance of personal relations which was incidental to it, or to the war which grew out of it, was more like that which occurs between the subjects of previously friendly nations, in case of war, than like that which is an ordinary incident of rebellion and civil war. In spite of the bitterness of language, which was mainly due to difference of feeling on the slavery question, the antagonisms of the war did not, to any great extent, reach down to that disruption of communal, social, and domestic bonds which is incidental to civil dissensions when the question of loy-

[1] Compare Mr. Garfield's remarks of Aug. 4, 1876, *ante*, p. 467.

[2] The question of equality or inequality of races in respect to the political capacities of the citizen, or, rather, the question, By what political authority those capacities shall hereafter be determined, in the case of any inhabitant of the States? remains as a legacy from the reconstruction measures, in connection with the question of a revolutionary change in the seat of sovereign power. Compare *ante*, p. 854.

[3] I consider myself entitled to use this term, because, on the theory presented herein, it can be seen to be rebellion, though I do not understand how it can be called such under any of the theories popularly received at the North.

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alty or disloyalty to a visible personal sovereign is clearly recognized as the question at issue.

For this question of loyalty to a sovereign is one which, more than any other, has divided men in their political, social, and even domestic relations. It has severed them, not merely as nation against nation, people against people, or state against state, in their external relations, but, more visibly and disastrously, as nations, peoples, states, in their internal relations; dividing them in every subordinate organization of human society, as the constituent members of provinces, cities, towns, communes, families, households; marshalling them against each other, not as rival political parties, but as enemies by the law of nations, under hostile banners, awaiting the arbitrament of the sword.[1]

If among the "unsettled questions" of the present moment the question of the location of ultimate supreme power is to be included, it can no longer be regarded as one on which a "solid" mass of States will be opposed by another equally "solid" mass, or as one in which the people of the country will be divided in opinion mainly as they are also divided by geographical or climatic distinctions. If the question, hereafter, is to assume the form of a question of force, between those who support a central or National government, claiming to represent the ultimate sovereign, and those who support the States as political organizations, sovereign in their union, the contest will be one dividing us as the constituent members of States, cities, towns, communes, families, and even households. If, in spite of all the "overwhelming argument" which either

[1] This idea must have presented itself to Mr. Garfield's mind when, in commencing his reply to Mr. Long's proposition (*ante*, p. 498), he said, "Mr. Chairman, I should be obliged to you to direct the sergeant-at-arms to bring a white flag and plant it in the aisle between myself and my colleague who has just addressed you." 38th Cong., 1st Sess., Globe, 1503.

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side can produce, the appeal is again made to the *ultima ratio regum* on the same question, we shall then know what civil war really is.

If such a day awaits us in the future, the jurists and the legal profession in all its departments will be as powerless to decide the question as they proved themselves to be in 1861.

The Supreme Court itself may then try to raise its voice above the shouts of contending factions, hoping to appear on the scene of fraternal strife like the heralds waving the sacred olive-boughs between the ranks of jarring Grecians; but no court of law can decide an issue upon which depends the validity of each justice's commission.

In such a crisis of a nation's fate the voice of the judiciary cannot be that of the umpire or of the peacemaker: it should rather be like the sound of the trumpet which summons one or the other of two armed hosts to the onset.

But if that trumpet give an uncertain sound, who shall prepare himself to the battle?

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